(34)

No. 05-1256
Title: Philip Morris USA, Petitioner
v.
Mayola Williams
Docketed: March 31, 2006
Lower Ct: Supreme Court of Oregon
Case Nos.: (S51805)
Decision Date: February 2, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 30 2006	Petition for a writ of certiorari filed. (Response due May 1, 2006)
Apr 28 2006	Brief of respondent Mayola Williams in opposition filed.
May 1 2006	Brief amicus curiae of Chamber of Commerce of the United States filed.
May 1 2006	Brief amicus curiae of Product Liability Advisory Council filed.
May 8 2006	Reply of petitioner Philip Morris USA filed. (Distributed)
May 9 2006	DISTRIBUTED for Conference of May 25, 2006.
May 30 2006	Petition GRANTED limited to Questions 1 and 2 presented by the petition.
Jul 3 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 28, 2006.
Jul 18 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jul 20 2006	Extension of time within which to file respondent's brief on the merits to and including September 15, 2006.
Jul 20 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent.
Jul 27 2006	Brief amicus curiae of Pacific Legal Foundation filed.
Jul 28 2006	Brief amicus curiae of American Tort Reform Association filed.
Jul 28 2006	Brief amici curiae of Steven L. Chanenson and John Y. Gotanda filed.
Jul 28 2006	Brief amicus curiae of Product Liability Advisory Council filed.
Jul 28 2006	Brief amicus curiae of Alliance of Automobile Manufacturers filed.
Jul 28 2006	Brief amicus curiae of Chamber of Commerce of the United States filed.
Jul 28 2006	Joint appendix filed.
Jul 28 2006	Brief of petitioner Philip Morris USA filed.
Jul 28 2006	Brief amici curiae of Washington Legal Foundation, and Allied Educational Foundation filed.
Jul 28 2006	Brief amici curiae of R.J. Reynolds Tobacco Company and Lorillard Tobacco Company filed.
Jul 28 2006	Brief amici curiae of National Association of Mutual Insurance Companies, et al. filed.
Jul 28 2006	Brief amici curiae of A. Mitchell Polinsky, Steven Shavell, and Cato Institute filed.
Jul 28 2006	Brief amici curiae of National Association of Manufacturers, et al. filed.
Jul 28 2006	Brief amici curiae of Oregon Forest Industries Council, et al. filed.
Aug 10 2006	Letter from James T. Newsom, Shook Hardy & Bacon LLP, received.
Aug 14 2006	SET FOR ARGUMENT on Tuesday, October 31, 2006.

Aug 14 2006	CIRCULATED.
Sep 14 2006	Brief amicus curiae of Trial Lawyers for Public Justice filed. (Distributed)
Sep 14 2006	Brief amicus curiae of Center for a Just Society filed. (Distributed)
Sep 15 2006	Brief of respondent Mayola Williams filed. (Distributed)
Sep 15 2006	Brief amici curiae of Neil Vidmar, et al. filed. (Distributed)
Sep 15 2006	Brief amici curiae of Professors Keith N. Hylton, et al. filed. (Distributed)
Sep 15 2006	Brief amici curiae of Oregon, et al. filed. (Distributed)
Sep 15 2006	Brief amici curiae of AARP, et al. filed. (Distributed)
Sep 15 2006	Brief amicus curiae of Association of Trial Lawyers of America filed. (Distributed)
Sep 15 2006	Brief amici curiae of Campaign for Tobacco-Free Kids, et al. filed. (Distributed)
Sep 15 2006	Brief amici curiae of Henry H. Drummonds, et al. filed. (Distributed)
Sep 15 2006	Brief amicus curiae of United Policyholders filed. (Distributed)
Sep 15 2006	Brief amici curiae of Akhil Reed Amar and Arthur McEvoy filed. (Distributed)
Sep 15 2006	Brief amici curiae of Tobacco Control Legal Consortium, et al. filed. (Distributed)
Oct 13 2006	Record received from Supreme Court of Oregon. (9 boxes)
Oct 16 2006	Reply of petitioner Philip Morris USA filed.
Oct 31 2006	Argued. For petitioner: Andrew L. Frey, New York, N.Y. For respondent: Robert S. Peck, Washington, D.C.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 05-

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

PETITION FOR A WRIT OF CERTIORARI

KENNETH S. GELLER
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

Counsel for Petitioner

QUESTIONS PRESENTED

In this case brought by the widow of a smoker, the jury held Philip Morris liable for fraud and awarded $79.5 million in punitive damages – 97 times the compensatory damages awarded by the jury. On remand from this Court for reconsideration in light of *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), the Oregon Supreme Court upheld the trial court's refusal to instruct the jury that it could not punish Philip Morris for harms to non-parties, concluding that a jury may punish for such harms so long as the conduct that caused those harms is similar to the conduct that harmed the plaintiff. Then, construing the evidence in the light most favorable to the plaintiff, the court proceeded to hold that the punitive award was not unconstitutionally excessive, despite concluding that the punitive award was not reasonably related to the harm to the plaintiff. The questions presented, each of which is the subject of a conflict in the lower courts, are:

1. Whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.

2. Whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.

3. Whether, in reviewing a punitive award for excessiveness, an appellate court is permitted to give the plaintiff the benefit of all conceivable inferences that might support a finding of high reprehensibility even if the jury made no such specific factual findings.

RULE 29.6 STATEMENT

Petitioner Philip Morris USA's corporate parent is Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns ten percent or more of Philip Morris USA's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Philip Morris USA ("Philip Morris") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Oregon in this case.

OPINIONS BELOW

The decision of the Oregon Supreme Court (App., *infra*, 1a-34a) is reported at 127 P.3d 1165. The decision of the Oregon Court of Appeals (App., *infra*, 35a-75a) is reported at 92 P.3d 126.

JURISDICTION

The judgment of the Oregon Supreme Court was entered on February 2, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. The Trial. Jesse Williams began smoking cigarettes in 1950 while in the Army in Korea, because other soldiers told him that the smoke would keep mosquitoes away. After 1955, Williams smoked Marlboros, manufactured and marketed by petitioner Philip Morris. App., *infra*, 36a. Williams eventually smoked three packs of cigarettes a day.

Williams had been taught as a child that smoking is unhealthy. He and his wife taught their children not to smoke. Citing the dangers of tobacco, his wife and children, in turn, repeatedly urged Williams to stop smoking. So did his physician. Although Williams referred to cigarettes as "cancer sticks," he reacted angrily when confronted with the risks of smoking. His wife frequently pointed to the warning labels on cigarette packages and told him that cigarettes would kill him. Williams reportedly responded: "Phooey. * * * This is what the Surgeon General says, it's not what [the] tobacco company says." According to his wife, Williams said that "cigarettes are not going to kill you, because I just heard this

so-and-so guy on TV, and he said that tobacco doesn't cause you cancer!" Williams' wife testified that in 1996, when Williams was diagnosed with lung cancer, he said: "Those darn cigarette people finally did it. They were lying all the time." Williams died in March 1997. App, *infra*, 36a. Williams's widow ("plaintiff") sued Philip Morris, alleging negligence and fraud.

At trial, plaintiff mounted a wide-ranging attack on 50 years of Philip Morris's conduct, introducing evidence relating not only to the company's statements concerning smoking and health (none of which plaintiff was shown to have heard or seen), but also to its research practices, its litigation positions, and its dealings with competitors. In closing arguments, plaintiff explicitly and repeatedly urged the jury to punish Philip Morris not only for the harm caused to Williams, but also for the alleged harms suffered by masses of other, unidentified people who were not before the court – people whose individual circumstances were never presented to any finder of fact. Plaintiff urged the jury to award punitive damages based on the supposition that ten out of every hundred smokers in Oregon would get cancer, and three or four of those ten would be Marlboro smokers:

> In Oregon, how many people do we see outside, driving home, coming to work, over the lunch hour smoking cigarettes? For every hundred cigarettes that they smoke are going to kill ten through lung cancer. And of those ten, four of them, or three of them I should say, because the market share of Marlboros is one-third * * *.
>
> When you determine the amount of money to award in punitive damages against Philip Morris * * * [i]t's fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been. It's more than fair to think about how many more are out there in the future.

Philip Morris sought an instruction that would have told the jury that any punitive award must bear a reasonable relationship to the harm caused to the plaintiff and that it was not permitted to punish Philip Morris for alleged harms suffered by non-parties. The trial court refused to give this instruction, choosing instead to tell the jury that it was free to award any amount of punitive damages up to $100 million, the amount arbitrarily requested in plaintiff's complaint.

The jury found for plaintiff on both her fraud and product design claims and awarded $821,485 in compensatory damages (reduced to $521,485 pursuant to Oregon's statutory cap on wrongful death damages). The jury also awarded $79.5 million in punitive damages for fraud but refused to award any punitive damages on the claims relating to the design of Philip Morris's cigarettes.

On post-trial motions, the trial court held that the punitive award was "excessive under federal standards." Accordingly, it reduced the punitive damages to $32 million – still 39 times the compensatory damages verdict.

2. Appeal and GVR. On appeal, the Oregon Court of Appeals rejected Philip Morris's contention that the jury should have been given Philip Morris's proposed instruction that any award of punitive damages had to be reasonably related to the harm caused to Williams himself (as opposed to non-parties), ruling that the proposed instruction misstated the applicable law. *Williams* v. *Philip Morris*, 48 P.3d 824 (Or. App. 2002). It further concluded that the jury's verdict had not been excessive and accordingly reinstated the jury's $79.5 million award. *Id.* at 843.[1]

After the Oregon Supreme Court denied review, Philip Morris petitioned for a writ of certiorari, raising both the "punishment for harm to others" issue and an excessiveness

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[1] Including interest, the award now amounts to nearly $130 million.

claim. This Court granted the petition, vacated the judgment, and remanded to the Oregon Court of Appeals for reconsideration in light of *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). *Philip Morris USA, Inc.* v. *Williams*, 540 U.S. 801 (2003).

3. Proceedings On Remand. On remand, the Oregon Court of Appeals once again upheld the $79.5 million award. It rejected Philip Morris's claims of instructional error, expressly holding that it was both permissible and appropriate for the jury to punish for harms to non-parties. App., *infra*, 75a. The Court of Appeals then held that the award was not excessive, again relying primarily on unproven harms to non-parties to justify the jury's massive award.

The Oregon Supreme Court affirmed. It stated that, in applying the excessiveness analysis set forth in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), it would "state all facts in the light most favorable to plaintiff." *Id.* at 2a; see also *id.* at 23a ("[W]e construe all facts in favor of plaintiff, the party in whose favor the jury ruled.").

Proceeding on that basis, the court stated that the jury could have found that Philip Morris had "deceived other smokers in Oregon" besides Mr. Williams and that Philip Morris's products "caused a significant number of deaths each year in Oregon during the pertinent time period * * * ." *Id.* at 7a-8a. Although no evidence had been introduced at trial to show whether any Oregon smoker other than Williams smoked and sustained injuries in reliance on the alleged fraud, the court held that widespread reliance and injury could be inferred. *Id.* at 8a n.1.

The court then addressed Philip Morris's contention that the jury should have been instructed not to punish the company for alleged harms suffered by non-parties. The court rejected the argument "that *Campbell* prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to non-parties." *Id.* at 18a. Indeed,

in considering the text of the proposed instruction – which would have permitted the jury to "consider," but not "punish" for, harm to others – the court stated: "It is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.* at 18a n.3.

The court then considered the three *BMW* "guideposts" for determining whether a punitive award is unconstitutionally excessive: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of punitive to compensatory damages; and (iii) any relevant legislatively established penalties for comparable conduct. 517 U.S. at 574-575.

Taking the evidence in the "light most favorable to the plaintiff," the court concluded that the record supported a finding that Philip Morris's conduct was "extraordinarily reprehensible." App., *infra*, 23a. As the court interpreted the evidence, the jury could have found that Philip Morris's misconduct affected "many Oregonians" who kept smoking and became ill or died. *Ibid.* The court further reasoned that the jury could have concluded that the misconduct harmed "a much broader class of Oregonians": those who "kept buying cigarettes – taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies." *Ibid.* Therefore, the court concluded, "the first *Gore* guidepost favors a very significant punitive damage award."

The court similarly held that the third *BMW* factor – the legislatively established penalties for comparable misconduct – supported a large punitive award: "Viewing the facts in the light most favorable to plaintiff, Philip Morris's actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter." *Id.* at 27a.

Addressing the relationship between the compensatory and punitive awards, the court recognized that "the second

Gore guidepost is not met." *Id.* at 31a. It acknowledged that "[a]ll arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the [U.S. Supreme] Court has said ordinarily will apply in the usual case." *Ibid.*[2] Nevertheless, the court explained, "the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may arise from a double-digit ratio." *Id.* at 33a.

REASONS FOR GRANTING THE PETITION

This case, which involves a massive punitive award to a single individual, presents three important constitutional questions bearing on the administration of punitive damages: whether a determination that a punitive award is excessive under the reasonable-relationship guidepost may be trumped by a determination that the other two guideposts support a large punitive award; whether punitive damages may be imposed to punish for harms to non-parties; and whether a reviewing court permissibly may assume that the jury drew every inference urged upon it by the plaintiff merely because it awarded the plaintiff a large amount of punitive damages.

Each of these questions is important, each recurs with regularity in punitive damages litigation, each has perplexed and divided the lower courts, and each was resolved incorrectly by the Oregon Supreme Court.

First, by holding that the ratio guidepost may be overridden by a finding of high reprehensibility, the court below provided courts throughout the country with a roadmap for evading this Court's efforts to bring predictability and discipline to punitive damages jurisprudence. Under the Oregon Supreme Court's approach, a court need only express the subjective conclusion that the defendant's conduct was

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[2] Indeed, if the statutorily capped amount of compensatory damages is used as the denominator, the ratio in this case rises from 97:1 to 152:1.

highly reprehensible and it then can uphold any punitive award no matter how disproportionate to the compensatory damages it may be. But this Court has never treated the three *BMW* guideposts as independent factors to be traded off against one another. Instead, it has established a range of constitutionally permissible ratios and suggested that the degree of reprehensibility (and the amount of compensatory damages) will determine where within that range the constitutional cut-off falls in a particular case. The Ninth Circuit has expressly so held; there thus exists a square conflict between a federal circuit court and the supreme court of a state within that circuit on this question.

Second, the Oregon Supreme Court's holding that a jury may punish a defendant for harms to similarly situated non-parties is a dangerous misreading of *State Farm*. A jury may never punish a defendant for harms to non-parties because doing so would inevitably expose the defendant to the risk of unconstitutional duplicative punishments. The California Supreme Court has expressly construed *State Farm* to bar punishment on this basis, so once again a square conflict exists.

Finally, by presuming that the jury resolved every factual dispute against petitioner notwithstanding the absence of any specific factual findings by the jury, the Oregon Supreme Court rendered *de novo* review completely toothless. Here, too, a clear conflict exists. As the California Supreme Court recognized in rejecting precisely this approach to post-verdict review, to defer to "findings" not necessarily made by the jury merely because the jury returned a large punitive verdict is to allow the punitive award to "indirectly justify itself," which is "inconsistent with de novo review."

Because the Oregon Supreme Court's various holdings collectively defy a decade of this Court's punitive damages jurisprudence and because each conflicts with decisions of

other state supreme courts or federal courts of appeals, review is both warranted and necessary.

I. THE OREGON SUPREME COURT'S RULING THAT THE RATIO GUIDEPOST MAY BE "OVERRIDDEN" VIOLATES THIS COURT'S PRECEDENTS AND CREATES A CONFLICT AMONG THE LOWER COURTS

A. The Framework Adopted And Applied By The Oregon Supreme Court Conflicts With This Court's Decisions In *BMW* And *State Farm*.

The Oregon Supreme Court acknowledged that the massive judgment under review did not satisfy the requirements of the *BMW* ratio guidepost. App., *infra*, 31a. It nevertheless affirmed the $79.5 million penalty, which yielded a ratio of almost 100:1, because "the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may arise from a double-digit ratio." *Id.* at 33a.

That approach directly conflicts with the decisions of this Court. In explaining why "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" (538 U.S. at 425), the Court specifically enumerated the circumstances that could permissibly give rise to double-digit ratios. Far from creating an exception for all "high reprehensibility" cases, as the Oregon Supreme Court believed, this Court stated that a double-digit ratio was permissible only when "a particularly egregious act has resulted in only a *small amount* of economic damages." *Ibid.* (emphasis added). That, of course, is not the case here.

The presence of aggravating reprehensibility factors alone does not override the ratio guidepost or even remove a case from the single-digit-ratio framework described in *State Farm* (much less justify the 97:1 ratio at issue here). To the

contrary, the degree of reprehensibility, among other factors, helps the court to determine which single-digit multiplier is appropriate. In *State Farm*, this Court explained that normally a punitive award of four times compensatory damages "might be close to the line of constitutional impropriety." *Ibid.* However, the absence of aggravating reprehensibility factors renders any punitive damages award "suspect." *Id.* at 419. *State Farm* itself involved at least two aggravating reprehensibility factors – intentional deceit and a financially vulnerable victim. See *id.* at 419, 420. Nevertheless, the Court suggested that any award producing a ratio of more than 1:1 would be unconstitutionally excessive on the facts of the case. *Id.* at 429.[3]

It makes no sense to consider each guidepost as an independent and sufficient factor that can "override" one or more of the others, as the Oregon Supreme Court did. Rather than "competitive tools," as the Oregon Supreme Court described them (App., *infra*, 32a), the guideposts are constructs that must be considered together in assessing the excessiveness of a punitive award. Reprehensibility may move the acceptable ratio up the single-digit range; it does not render the ratio guidepost inapplicable. By treating the ratio guidepost as an abstract inquiry that could be overridden by high reprehensibility, the Oregon Supreme Court's decision sets punitive damages free of any concrete "reasonable relationship" requirement and conflicts with this Court's punitive damages jurisprudence.

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[3] On remand, the Utah Supreme Court held that a 9:1 ratio was permissible after finding all five reprehensibility sub-factors to have been established. *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah), cert. denied, 543 U.S. 874 (2004).

B. The Oregon Supreme Court's Approach Conflicts With That Of The Ninth Circuit And Deepens The Division Among The Lower Courts.

The Oregon Supreme Court's ruling conflicts with the far different approach taken by the Ninth Circuit, which assesses the *BMW* guideposts in tandem with one another. That court recently explained:

> Although the Supreme Court has eschewed any specific formula, we discern from *BMW* and its progeny a rough framework for evaluating whether there is a reasonable relationship between the punitive damages award and the actual or likely harm associated with the wrongful conduct. In cases where there are significant economic damages and punitive damages are warranted but behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality. See, *e.g.*, *State Farm*, 538 U.S. at 425, 123 S.Ct. 1513 (acts of bad faith and fraud warranted something closer to a 1 to 1 ratio). In cases with significant economic damages and more egregious behavior, a single-digit ratio greater than 4 to 1 might be constitutional. See, *e.g.*, *Zhang* [v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1043-1044 (9th Cir. 2003)] (post-*State Farm* case upholding 7 to 1 ratio where the wrongful conduct involved significant racial discrimination); *Bains LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 776-777 (9th Cir. 2005) (post-*State Farm* case indicating that ratio between 6 to 1 and 9 to 1 would be constitutional where underlying wrongful conduct was racial discrimination). And in cases where there are insignificant economic damages but the behavior was particularly egregious, the single-digit ratio may not be a good proxy for constitutionality. See, *e.g.*, *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (upholding a

> punitive damage award with a 37 to 1 ratio of punitive damages to compensatory damages as constitutional because defendant's behavior was outrageous but the compensable harm" was nominal and difficult to quantify).

Planned Parenthood of the Columbia/Willamette, Inc. v. *American Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005). The Ninth Circuit's approach, with its appreciation that the reprehensibility analysis operates within limits set by the ratio guidepost, is irreconcilable with Oregon's, which simply tosses out the ratio consideration when high reprehensibility is found.

The existence of a conflict such as this one, between a federal appellate court and the high court of one of its constituent states, is a compelling reason to grant review. See *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985). That is because such conflicts may lead to forum shopping and will produce different results based on nothing more than whether a particular lawsuit is removable.

A number of other courts agree with the Oregon Supreme Court that reprehensibility (a highly subjective criterion) may trump the ratio guidepost. These courts have expressly disregarded the single-digit limitation in cases in which none of the exceptions identified in *State Farm* was present, on the theory that high reprehensibility suffices to break the single-digit barrier.

In *Mission Resources, Inc.* v. *Garza Energy Trust*, 166 S.W.3d 301 (Tex. Ct. App. 2005), for example, the Texas Court of Appeals upheld a $10 million punitive award for trespass where the compensatory damages were $543,667. The court "[a]dmitted[]" that the ratio "of approximately 20 to 1 * * * exceeds the 'single-digit multipliers,' which, according to the Supreme Court, 'are more likely to comport with due process.'" *Id.* at 319. It nevertheless upheld the award because the trespass was "highly unlawful." *Ibid.*

Similarly, in *Superior Federal Bank* v. *Jones & Mackey Construction Co.*, 2005 WL 3307074 (Ark. Ct. App. Dec. 7, 2005), the Arkansas Court of Appeals upheld a $3.08 million punitive damages award for defamation that was 17.6 times the $175,000 compensatory damages awarded on that claim. The court recognized that "this ratio is greater than the single-digit ratio mentioned in *Campbell*," and therefore was "constitutionally suspect." *Id.* at 6-7. But it upheld the award simply because "a 17.6-to-1 ratio is not breathtaking." *Id.* at 7. And in *White* v. *Ford Motor Co.*, Slip Op., No. CV-N-95-279-DWH-(PHA) (D. Nev. Mar. 15, 2005), the district court upheld a $52 million punitive damages award that was 22.6 times the $2.3 million compensatory award on the ground that "a single-digit multiplier does not necessarily form an appropriate limitation upon a punitive damages award" in a "malicious-conduct wrongful death action." Slip Op. at 42.[4] The majority of lower courts, on the other hand, have heeded this Court's admonition that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425.[5]

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[4] See also, *e.g.*, *Phelps* v. *Louisville Water Co.*, 103 S.W.3d 46, 55 (Ky. 2003) (upholding $2 million punitive award for wrongful death that was 11.3 times the $176,361.64 compensatory award); *Action Marine, Inc.* v. *Continental Carbon, Inc.*, 2006 WL 173653, at *8 n.6 (M.D. Ala. Jan. 23, 2006) (upholding $17.5 million punitive award for release of carbon black resulting in property damages of $1.9 million; noting that "the facts of this case could have supported an even higher multiplier [than 9.14:1]" because "a strong state interest in deterrence of a particular wrongful act may justify ratios higher than might otherwise be acceptable").

[5] See, *e.g.*, *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 596, 612 (6th Cir. 2006) (reducing $3 million punitive award to $471,258.26, the amount of compensatory damages); *Conseco Fin. Servicing Corp.* v. *North Am. Mortgage Co.*, 381 F.3d 811, 825 (8th Cir. 2004) (reducing $18 million punitive award to $7 million, for a ratio of 2:1);

The courts are also in conflict as to how to apply the guideposts when the misconduct is especially reprehensible (militating in favor of a high ratio) and the amount of compensatory damages is substantial (militating in favor of a low ratio). In such circumstances, some courts have held that a ratio at the lower end of the single-digit range is appropriate. See, *e.g.*, *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 598 (8th Cir. 2005) ("approximately 1:1") and *Ceimo* v. *General Am. Life Ins. Co.*, 137 Fed. Appx. 968, 970 (9th Cir. 2005) (affirming reduction to approximately 1:1) with *Grefer* v. *Alpha Technical*, 901 So. 2d 1117, 1152 (La. Ct. App. 2005) (reducing 18:1 ratio to 2:1); *Eden Elec., Ltd.* v. *Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004) (affirming reduction to 4.5:1 ratio). Other courts, however, have upheld awards at the upper end of that range even where the compensatory award is in seven figures. See, *e.g.*, *Boeken* v. *Philip Morris Inc.*, 26 Cal. Rptr. 3d 638, 687 (Cal. Ct. App. 2005) (reducing 18:1 ratio to 9:1), cert. denied, __ S. Ct. __

Bach v. *First Union Nat'l Bank*, 149 Fed. Appx. 354, 366 (6th Cir. 2005) (6.6:1 ratio was "alarming" where compensatory damages were $400,000); *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 834 (8th Cir. 2004) (in wrongful death case, remitting $5 million punitive award to $2 million, for a ratio of 4:1); *Fresh* v. *Entm't U.S.A. of Tenn., Inc.*, 340 F. Supp.2d 851, 860 (W.D. Tenn. 2003) (holding that 4:1 ratio was constitutional maximum in assault case); *Young* v. *DaimlerChrysler Corp.*, 2004 WL 2538639, at *4 (S.D. Ind. Oct. 19, 2004) (holding that 3:1 was maximum permissible ratio in discrimination case); *Roth* v. *Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003) (vacating punitive award that was 20 times the $25,000 compensatory award and suggesting that 1:1 ratio was constitutional maximum); *Cass* v. *Stephens*, 156 S.W.3d 38, 77 (Tex. Ct. App. 2004) (holding, in fraud and malicious conversion case involving $200,082 in compensatory damages, that 4:1 ratio was constitutional limit); *Diamond Woodworks, Inc.* v. *Argonaut Ins. Co.* 135 Cal. Rptr. 2d 736, 760-761 (Ct. App. 2003) (holding that 4:1 was maximum ratio in insurance bad-faith case).

(Mar. 20, 2006); *Planned Parenthood*, 422 F.3d at 962 (holding that 9:1 was constitutional maximum).

The Constitution does not require a "one size fits all" approach to assessing the ratio guidepost. But the current level of conflict and confusion on the ratio question in the lower courts is intolerable. The bottom line is that the guidepost is not being applied in any principled or predictable manner. The Oregon Supreme Court's doctrinal holding – that the reasonable-relationship requirement can be "overridden" whenever the conduct is highly reprehensible – promises to exacerbate that disarray and to undermine the constitutional principles established in *BMW* and *State Farm*. The importance of this issue could not be greater, and the need for review could not be more pressing.

II. THE OREGON SUPREME COURT'S APPROVAL OF THE IMPOSITION OF PUNISHMENT FOR HARMS SUFFERED BY NON-PARTIES VIOLATES *STATE FARM* AND CREATES A CONFLICT WITH DECISIONS OF OTHER COURTS

The jury returned an enormous punitive award because it was urged and permitted to punish Philip Morris for the harms suffered by every Oregonian who smoked the company's cigarettes. Philip Morris asked the trial court to instruct the jury that it could not punish Philip Morris for the effects of its conduct on non-parties. The proposed instruction stated:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable conduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in

> which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit.

App., *infra*, 17a-18a. The trial court refused to give the instruction, and plaintiff's counsel exploited that ruling by repeatedly urging the jury to punish Philip Morris for harms suffered by anyone in Oregon who smoked Philip Morris's cigarettes. See page 2, *supra*.

The Oregon Supreme Court held that *State Farm* does not prohibit punishing for harms to similarly situated non-parties. Accordingly, it rejected the claim of instructional error:

> Philip Morris's proposed jury instruction would have prohibited the jury from 'punishing the defendant for the impact of its alleged misconduct on other persons,' even if those other persons were Oregonians who were harmed by the conduct that had harmed Williams, and in the same way. As we noted, that is not correct as an independent matter of Oregon law respecting the conduct of jury trials and instructions that are given to juries. Neither, as we read in [*sic*] *Campbell*, does it correctly state federal due process law.

App., *infra*, 20a-21a.

The Oregon Supreme Court's holding that punitive damages may properly be awarded to punish for harms to non-parties conflicts with *State Farm* and decisions of the California Supreme Court and the Eighth Circuit. It is a recipe for multiple punishments for the same harms, and it will spawn confusion in future punitive damages litigation. Review is needed to resolve the split and prevent the further erosion of the principles enunciated in *State Farm*.

A. The Oregon Supreme Court's Holding Conflicts With This Court's Decision In *State Farm* And With Decisions Of Other Appellate Courts.

In *State Farm*, this Court held that juries could consider the effect of the defendant's conduct on persons other than the plaintiff for purposes of assessing the *reprehensibility* of that conduct, but may not impose punitive damages to *punish* the defendant for harms to non-parties. See 538 U.S. at 422-423. This distinction is not new in the law, but in fact is applied by courts every day in implementing recidivism statutes. See, *e.g.*, *Nichols* v. *United States*, 511 U.S. 738, 747 (1994) (repeat-offender laws "penalize only the last offense committed by the defendant").

The Oregon Supreme Court did not understand the distinction between punishing the defendants for harm to non-parties and considering such harm for purposes of assessing reprehensibility. The court stated that "[i]t is unclear to us how a jury could 'consider' harms to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." App., *infra*, 18a n.3.

The distinction between gauging reprehensibility and imposing punishment, however, is central to this Court's punitive damages jurisprudence. It is a critical protection against duplicative punishment. The Court made clear in *State Farm* that a defendant may be punished only for the harm to the plaintiff before the court – and not for harms that may have been suffered by non-parties. The Oregon Supreme Court's contrary position is identical to the Utah Supreme Court's rationale for upholding the $145 million punitive award that this Court found grossly excessive in *State Farm*. See 538 U.S. at 423 (quoting Utah Supreme Court's statement that "[e]ven if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual

but massive in the aggregate'"). This Court expressly *rejected* the aggregate approach to assessing punitive damages, explaining:

> Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Ibid.

At the same time, the Court in *State Farm* explained that, under certain circumstances, evidence of a defendant's similar wrongs might nevertheless be admissible to assist the jury in assessing the degree of reprehensibility of the defendant's conduct. *Id.* at 422. Due process allows a range of permissible punishments in any given case – a range that is generally limited by the ratio guidepost. According to this Court, in most cases, the maximum allowable penalty will run from zero to nine times the amount of compensatory damages (depending upon the reprehensibility of the defendant's misconduct, the size of the compensatory award, and other factors). *Id.* at 423-425. In determining where within the permissible range a punitive damages award should fall, juries can appropriately take into account whether the specific conduct that injured the plaintiff is more blameworthy because it also endangered others. And in deciding what the outer limit is in a particular case, a reviewing court too can weigh the character of the defendant's conduct, including the magnitude of the harms to which it exposed the public. However, both jury

and court may *punish* the defendant only for the harm that its misconduct inflicted on the plaintiff in the case before it.[6]

While the court below claimed to be baffled by this distinction, it is commonplace in other areas of the law. For example, evidence of similar wrongs in punitive damages cases plays a role akin to the role of other uncharged criminal conduct in sentencing. A defendant's entire course of conduct may be relevant in determining where, within a range of potential sentences, the penalty for the particular conviction should fall. But the defendant cannot be *punished* for past or contemporaneous uncharged offenses, or indeed for anything other than the offense of conviction. See, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 154 (1997) ("sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction").[7]

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[6] The Court drew a similar distinction in *BMW* when addressing the role of evidence of conduct affecting individuals outside of the forum state. See 517 U.S. at 574 n.21 ("Of course, the fact that the Alabama Supreme Court correctly concluded that it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction does not mean that evidence describing out-of-state transactions is irrelevant in a case of this kind. To the contrary, * * * such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct.").

[7] See also *Witte* v. *United States*, 515 U.S. 389, 401-403 (1995) ("[C]onsideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." Rather, the defendant is "punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment * * *.") (emphasis in original); *Johnson* v. *Ford Motor Co.*, 113 P.3d 82, 92 n.6 (2005) ("An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, a stiffened penalty for the last crime, which is considered to be an

By the same token, the degree of wantonness reflected in the defendant's conduct may warrant an enhanced penalty for that conduct, but that is fundamentally different from punishing the defendant for harms to other people. The former weighs the degree of reprehensibility of a defendant's conduct; the latter runs a significant risk of "double count[ing] by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover." *BMW*, 517 U.S. at 593 (Breyer, J., concurring).

The Oregon Supreme Court's ruling not only is contrary to *State Farm*, it also conflicts with the holdings of the California Supreme Court and the Eighth Circuit. In *Johnson* v. *Ford Motor Co.*, 113 P.3d 82 (Cal. 2005), the California Supreme Court ruled that in an individual action, punitive damages cannot be used to punish a defendant for alleged harm to non-parties because such an award would allow the individual plaintiff to recover without ever proving the specifics of those "hypothetical claims." *Id.* at 95. As the California Supreme Court explained in *Johnson*, the jury, and a reviewing court, may consider "[t]he scale and profitability of a course of wrongful conduct" in assessing reprehensibility, but only within the framework established by the other two guideposts; the defendant cannot be *punished* for harms to anyone other than the plaintiff before the court. *Id.* at 93. Similarly, the Eighth Circuit has held that "[p]unishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff * * * deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure." *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004).

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aggravated offense because a repetitive one.") (quoting *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948)) (internal quotation marks omitted).

The issue of how to deal with harm to non-parties has engendered confusion among other courts as well. Compare, *e.g.*, *University Med. Assoc. of the Med. Univ. of South Carolina* v. *UNUMProvident Corp.*, 335 F. Supp. 2d 702, 711 (D.S.C. 2004) (relying on subsequent wrongful conduct to enhance punitive award because such conduct "would result in precisely the type of repetitive harm contemplated in *State Farm* as ripe for larger punitive damage awards") with *Gober* v. *Ralph's Grocery Co.*, 127 Cal. App. 4th 204, 223 (Cal. Ct. App. Mar. 5, 2006) (refusing to consider defendant's subsequent wrongful conduct as evidence of recidivism or in comparable penalties analysis because the victims of that conduct could sue in their own right) and *Wohlwend* v. *Edwards*, 796 N.E.2d 781, 783 (Ind. Ct. App. 2005) (trial court erred in admitting evidence of subsequent wrongful conduct because relevance of that evidence was substantially outweighed by the danger that the jury would use it to punish defendant for his subsequent conduct rather than for the act that gave rise to plaintiff's actual damages). This Court's guidance is plainly needed.

B. The Oregon Supreme Court's Holding Will Have Significant Negative Consequences If Permitted To Stand.

The Oregon Supreme Court's determination that the Constitution permits a jury in one case to punish for injuries presumed to have been suffered by non-parties will have substantial, negative repercussions if not corrected. It subjects defendants to all the risks of a class action, while affording them none of the safeguards required by due process.[8] It

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[8] See, *e.g.*, Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs* 87 MINN. L. REV. 583, 654-656 (2003) ("Because punitive damages are properly recoverable for each individual injury only if all of the elements of the underlying cause of action are present and there are no affirmative defenses, the defendant must be per-

creates a grave risk of excessive, multiple punishment.[9] It also works as a one-way ratchet that guarantees that corporate defendants will continue to be exposed to the risk of massive penalties for a course of conduct no matter how many times they are exonerated by courts and juries. See *Johnson*, 113 P.3d at 94-95 (imposing punitive damages for harms to others would "present a problem of 'successive prosecution' in which a defendant that loses a single case would also lose the benefit of all previous victories against the same claim of misconduct"). Indeed, the Oregon Supreme Court's approach threatens to turn every case into a "bet-the-company" event, thereby distorting the legal system by creating inordinate pressure to settle even weak cases.[10]

In addition, a defendant in an individual case cannot reasonably be expected to fend off allegations of misconduct affecting individuals who are not before the court. This case

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mitted to contest causation and other elements of the alleged tort on an individual basis with respect to each victim and to raise all affirmative defenses that it might have against particular victims.").

[9] See *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839-840 (2d Cir. 1967) (Friendly, J.) (describing multiple-punishment problem).

[10] See, *e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (observing that aggregating the claims of multiple alleged victims in a single case can place a defendant that has won the lion's share of individual cases "under intense pressure to settle" rather than "roll these dice" and risk potentially bankrupting liability); *Castano* v. *Am. Tobacco Co.* 84 F.3d 734, 746 (5th Cir. 1996) ("[a]ggregation of claims * * * makes it more likely that a defendant will be found liable and results in significantly higher damage awards," which in turn "creates insurmountable pressure on defendants to settle" because the prospect of "an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").

perfectly illustrates the problem. The record here contains no evidence whatsoever regarding the extent to which other smokers were induced by any Philip Morris misconduct to begin or continue smoking. Yet both the arguments of counsel and the opinions of the Oregon courts rested on the facile assumption that Philip Morris could properly be punished for the injuries of everyone in Oregon who became ill as a result of smoking its cigarettes. That assumption is indefensible: It is entirely lawful to sell cigarettes, notwithstanding the known dangers to health; and people who smoke knowing the risks have no claim to have been unlawfully injured.[11] The position of the courts below not only invites, it ultimately rests on, impermissible speculation about the circumstances of all other potential "victims" as to whom there is no evidence one way or another.

There thus are important practical reasons, in addition to the conflicts with decisions of this and other courts, to grant review on this issue. This Court should do so and should reverse the decision below.

III. THE OREGON SUPREME COURT'S USE OF A SUFFICIENCY-OF-THE-EVIDENCE STANDARD IN ASSESSING THE CONSTITUTIONALITY OF A PUNITIVE DAMAGES AWARD IS CONTRARY TO THIS COURT'S PRECEDENTS AND CONFLICTS WITH A DECISION OF THE CALIFORNIA SUPREME COURT.

This case raises a third critical issue that arises in virtually every punitive damages appeal and is the subject of a split of authority: whether, when reviewing a punitive award for excessiveness, a court is permitted to assume that the jury decided all disputed facts in favor of the plaintiff. This is a threshold question that arises whenever an appellate court is

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[11] For that reason (among others), most of the juries that have heard cases against Philip Morris have found for the defense.

tasked with evaluating an excessiveness challenge to a punitive award but lacks the benefit of specific fact-findings by the jury or the trial court.

In *Cooper Industries, Inc.* v. *Leatherman Tool Group*, 532 U.S. 424 (2001), the Court held that appellate courts must conduct a *de novo* review of trial courts' application of the three *BMW* excessiveness guideposts. 532 U.S. at 436. The Court reiterated that mandate in *State Farm*, observing that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." 538 U.S. at 418 (internal quotation marks omitted). In neither *Cooper Industries* nor *State Farm*, however, did the Court instruct lower courts how to implement this *de novo* review when the jury has not rendered any specific factual findings. This Court should resolve the issue once and for all.

A. The Lower Courts Are Divided As To The Proper Implementation Of *De Novo* Review.

In *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 (Cal. 2005), the California Supreme Court ruled that, when the jury has made "no * * * express finding" on a particular issue bearing on application of the *BMW* guideposts, an appellate court should not simply assume that all relevant facts were resolved by the jury in the plaintiff's favor. It explained that to infer a factual finding unfavorable to the defendant "from the size of the award would be inconsistent with de novo review, for the award's size would thereby indirectly justify itself." *Ibid.* Accordingly, "[w]hile [courts must] defer to express jury findings supported by the evidence, in the absence of an express finding on the question [they] must independently decide" whether the fact at issue has been established. *Id.* at 72.[12]

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[12] See also *Wolf* v. *Wolf*, 690 N.W.2d 887, 894 (Iowa 2005) (assessing reprehensibility on the basis of a "de novo review of the

Many other courts, however, including the Oregon Supreme Court, have taken a fundamentally different position, choosing instead to apply a sufficiency-of-the-evidence standard. Under traditional sufficiency analysis, reviewing courts assume the existence of any fact necessary to support liability so long as the record contains "substantial evidence" from which a reasonable jury could have made the required finding. The Oregon Supreme Court adopted this approach for assessing punitive damages awards in *Parrott* v. *Carr Chevrolet, Inc.*, 17 P.3d. 473, 485 (Or. 2001), a decision that predates *Cooper Industries*.

Drawing all inferences in favor of the prevailing party makes perfect sense in addressing evidentiary sufficiency questions. However, the rationale for the practice simply does not apply to the fundamentally different context of excessiveness analysis. When the jury renders a liability verdict, the reviewing court should presume that the jury made all factual findings necessary to uphold that verdict, provided sufficient evidence exists for those findings in the record. By contrast, when the jury awards punitive damages, no particular factual findings are "necessary" to its assessment of the amount. See *Cooper Industries*, 532 U.S. at 437 (the amount of punitive damages that will punish and deter is "not really a 'fact' tried by the jury"). It is erroneous to infer from the size of the award findings of fact that the jury did not make – thereby, in the words of the California Supreme Court, allowing the punitive award to "indirectly justify itself" (*Simon*, 113 P.3d at 70).

The decision below is emblematic of this circular approach. The Oregon Supreme Court repeatedly emphasized that, in performing its excessiveness review, it would "con-

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record"); *Park* v. *Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *13-14 (Guam Nov. 16, 2004) (evaluating the record *de novo* in excessiveness analysis); *Aken* v. *Plains Elec. Generation & Transmission Co-Op, Inc.*, 49 P.3d 662, 668 (N.M. 2002).

strue all facts in favor of plaintiff, the party in whose favor the jury ruled."[13] App., *infra*, 23a; see also *id.* at 2a; *ibid.*[14]

The Oregon Supreme Court is not alone in deferring to the plaintiff's version of events in assessing the degree of reprehensibility of the punishable conduct. See, *e.g.*, *Stogsdill* v. *Healthmark, L.L.C.*, 377 F.3d 827, 831 (8th Cir. 2004) ("viewing the evidence in the light most favorable to the plaintiffs" as part of state and federal excessiveness review); *Hangarter* v. *Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014 (9th Cir. 2004) (same); *Staskal* v. *Symons Corp.*, 706 N.W.2d 311, 333 (Wis. App. 2005) (same); *Union Pac. R.R. Co.* v. *Barber*, 149 S.W.3d 325, 346 (Ark.) (same), cert. denied, 543 U.S. 940 (2004); *Bogle* v. *McClure*, 332 F.3d 1347, 1361 (11th Cir. 2003) (reprehensibility analysis rested on what "a reasonable jury could have concluded from the evidence"); *Chu* v. *Hong*, 2005 WL 2692464, at *6 (Tex.

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[13] This characterization of the jury verdict is itself debatable. The jury awarded $79.5 million in punitive damages on plaintiff's fraud claim but it unanimously chose not to award punitive damages on plaintiff's product-design-based claims. Although defendant "prevailed" on the latter claim, the Oregon Supreme Court nevertheless viewed evidence of the defendant's product-design conduct in the light most favorable to plaintiff in order to justify the punitive award. See, *e.g.*, App., *infra*, 6a; *id.* at 8a.

[14] The opinion is replete with instances in which the court stated that the jury "could have found" for plaintiff on a hotly disputed issue, rather than making an independent determination on that issue. See, *e.g.*, App., *infra*, 5a; *id.* at 6a; *id.* at 7a.

The Oregon Supreme Court's statement that "the parties do not dispute the way that the Court of Appeals framed the facts" (App., *infra*, 2a) is flatly inaccurate. Philip Morris expressly stated in its brief that it "adopt[ed] and incorporate[d] by reference the Statement of Facts in its opening brief in the Court of Appeals," which sharply contested the version of the record put forth by plaintiff and ultimately adopted by the Court of Appeals.

App. Oct. 20, 2005) ("[A] reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so.").

B. The Circular Approach Employed By The Court Below Cannot Be Squared With This Court's Precedents.

The practice of lower courts simply to assume from the size of the punitive award that the jury has found the defendant's conduct to be highly reprehensible, and then to assume that the jury supported that finding with factual conclusions that the jury nowhere expressed, cannot be reconciled with this Court's punitive damages jurisprudence.

In *BMW*, for example, the plaintiff's theory was that "BMW was palming off damaged, inferior-quality goods as new and undamaged, so that BMW could pocket 10 percent more than the true value of each car." Brief of Respondent at 17, *BMW of N. Am., Inc.* v. *Gore*, No. 94-896, 1995 WL 330613, at *17 (May 30, 1995). Had a sufficiency-of-the-evidence standard been applicable, the Court would have had to accept this inference as one that the jury reasonably could have reached. Instead, the Court reviewed the record for itself and, in the course of concluding that the case implicated "none of the aggravating factors associated with particularly reprehensible conduct," found "no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers." 517 U.S. at 576, 579.

In *Cooper Industries*, the Court observed that "the level of punitive damages is not really a 'fact' 'tried' by the jury," but instead "is an expression of [the jury's] moral condemnation." 532 U.S. at 432, 437 (internal quotation marks omitted). The Court accordingly held that appellate review of a trial court's application of the *BMW* guideposts is *de novo*. In the course of so holding, it indicated that reviewing courts must accept "*specific* findings of fact" by the jury (*id.* at 439

n.12 (emphasis added)), thereby implying that, in the absence of such findings, reviewing courts must resolve for themselves factual issues bearing on the application of the three guideposts. The Court then did just that, expressly rejecting the plaintiff's assertion that, for purposes of the second guidepost, the potential harm was $3 million. *Id.* at 441-442.

And in *State Farm*, after reiterating the importance of "[e]xacting appellate review" (538 U.S. at 418), the Court gave no deference to findings that the jury could have made but did not *necessarily* make, instead concluding from its own review of the record that there was "scant evidence of repeated misconduct of the sort that injured [the plaintiffs]." *Id.* at 423. The fact that the jury had seen fit to award the plaintiff $145 million in punitive damages did not persuade this Court that State Farm's conduct had in fact been highly reprehensible.

The present case demonstrates that the concern about phantom factual determinations is not hypothetical. Philip Morris's net worth was a focal point of the punitive damages phase of the trial. The trial court instructed the jury – in reliance on the complaint's *ad damnum* – that it could award up to $100 million in punitive damages. It is simply impossible to tell from the bare fact of the jury's $79.5 million verdict which if any of the inferences urged by plaintiff was accepted by the jury. The jury may well have believed, especially on the record before it, that Philip Morris had not done most of what the plaintiff had accused it of doing (see note 13, *supra*), but that $79.5 million was an appropriate award in view of the plaintiff's exhortation to exact punishment for every Oregon smoker who ever has or ever will become ill from smoking, as well as Philip Morris's substantial financial resources. Indeed, the one thing that we *do* know is that the jury decided that it did not need to award the full amount that the plaintiff had requested.

The bottom line is that when – as here – the jury has not been asked to respond to special interrogatories bearing on the degree of reprehensibility of the defendant's conduct and other considerations relevant to setting the amount of punitive damages, reviewing courts may not simply assume that every relevant factual dispute was resolved against the defendant and indulge every inference urged by the plaintiff. Instead, reviewing courts must independently assess the disputed factual issues before applying the three *BMW* guideposts.

This is, as previously noted, an issue that arises in every punitive damages appeal – as well as one on which there is a clear split of authority. This Court should grant review to address this highly important, frequently recurring issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH S. GELLER
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

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APPENDIX

APPENDIX A

OREGON SUPREME COURT OPINION

340 Ore. 35, 127 P.3d 1165

Supreme Court of Oregon.

MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS,
Deceased, Respondent on Review,

v.

PHILIP MORRIS INCORPORATED, NKA PHILIP MORRIS USA INC.,
Petitioner on Review,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., AND PHILIP MORRIS COMPANIES, INC.,
Defendants.

(CC 9705-03957; CA A106791; SC S51805).

Argued and Submitted May 10, 2005.
Decided Feb. 2, 2006.

This tort case arose out of the death of Jesse Williams, a smoker, who died of lung cancer. Plaintiff Mayola Williams is the widow of Jesse Williams and personal representative of his estate. Plaintiff sued defendant Philip Morris Inc. for, *inter alia*, negligence and fraud, asserting a causal connection between Jesse Williams's smoking habit and his death. A jury found for plaintiff on both causes of action. The jury awarded both economic and noneconomic damages; it also awarded plaintiff punitive damages of $79.5 million. The issue before us is whether that punitive damage award violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court of Appeals concluded that it did not. *Williams v. Philip Morris Inc.*, 182 Or.App. 44, 48 P.3d 824 (2002) (*Williams I*), *adh'd to on re-*

cons., 183 Or.App. 192, 51 P.3d 670, *rev. den.*, 335 Or. 142, 61 P.3d 938 (2002), *vac'd and rem'd*, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003), *on remand*, 193 Or.App. 527, 92 P.3d 126 (2004) (*Williams II*). For the reasons that follow, we agree.

I. FACTS

Because the jury ruled in favor of plaintiff, we state all facts in the light most favorable to plaintiff. *See Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 556, 17 P.3d 473 (2001) ("[W]hen reviewing a punitive damages award for excessiveness, the reviewing court must view the facts in the light most favorable to the jury's verdict if there is evidence in the record to support them."). Because the parties do not dispute the way that the Court of Appeals framed the facts, we quote extensively from that court's opinions.

Jesse Williams was a lifelong smoker who eventually died of lung cancer. The cancer was caused by Williams's smoking.

> "From the early 1950s until his death from a smoking-related lung cancer in 1997, Williams smoked [Philip Morris]'s cigarettes, primarily its Marlboro brand, eventually developing a habit of three packs a day. At that point, he spent half his waking hours smoking and was highly addicted to tobacco, both physiologically and psychologically. Although, at the urging of his wife and children, he made several attempts to stop smoking, each time he failed, in part because of his addiction. Despite the increasing amount of information that linked smoking to health problems during that 40-year period, Williams resisted accepting or attempting to act on it. When his family told him that cigarettes were dangerous to his health, he replied that the cigarette companies would not sell them if they were as dangerous as his family claimed. When one of his sons tried to get him to read articles about the dangers of smoking, he responded by finding

> published assertions that cigarette smoking was not dangerous. However, when Williams learned that he had inoperable lung cancer he felt betrayed, stating 'those darn cigarette people finally did it. They were lying all the time.' He died about six months after his diagnosis."

Williams II, 193 Or.App. at 530-31, 92 P.3d 126.

Plaintiff based her fraud claim against Philip Morris on a 40-year publicity campaign by Philip Morris and the tobacco industry to undercut published concerns about the dangers of smoking. *Id.* at 531, 92 P.3d 126. Philip Morris and the tobacco industry had known for most of those 40 years, if not all of them, that smoking was dangerous. *Id.* Nevertheless, they tried to create in the public mind the impression that there were legitimate reasons to doubt the danger of smoking. *Id.* Philip Morris and the tobacco industry did so to give smokers a reason to keep smoking (or, perhaps more accurately, to undermine one of the main incentives for smokers to stop smoking). *Id.*

The Court of Appeals summarized the evidence regarding the campaign as follows:

> "The industry established its strategy and began developing its public image in response to a decline in cigarette sales in 1953 that was the apparent result of studies that showed that cigarette tar could cause cancer in mice and that established the existence of statistical correlations between smoking and lung cancer. The first public joint effort by the industry occurred in January 1954, when [Philip Morris] and other tobacco companies published a joint statement in 448 newspapers throughout the country. In that statement, among other things, they announced the creation of the Tobacco Industry Research Committee (TIRC), one of whose stated goals was to conduct research into 'all phases of tobacco use and health.' In 1964, the year of the Surgeon General's report on the hazard of smoking to health, the industry divided

the TIRC into two parts, one of which, the Council on Tobacco Research (CTR), continued to support scientific research. The other part, named the Tobacco Institute, focused on public relations and lobbying.

"Between 1954 and the 1990s, those organizations developed and promoted an extensive campaign to counter the effects of negative scientific information on cigarette sales. The individual tobacco companies, including [Philip Morris], were part of the organizations and acted in cooperation with them. At first, the industry publicly denied that there was a problem; for example, in the 1950s and early 1960s, [Philip Morris]'s officials told the public that [Philip Morris] would 'stop business tomorrow' if it believed that its products were harmful. For most of that period, however, the industry did not attempt to refute the scientific information directly; rather, it tried to find ways to create doubts about it. The industry's goal was to create the impression that scientists disagreed about whether cigarette smoking was dangerous, that the industry was vigorously conducting research into the issue, and that a definitive answer would not be possible until that research was complete. As one of [Philip Morris]'s vice-presidents explained in an internal memo, the purpose was to give smokers a psychological crutch and a self-rationale that would encourage them to continue smoking. A Tobacco Institute internal memorandum similarly described the industry's purpose to provide smokers 'ready-made credible alternatives' to the evidence of the dangers of smoking.

"Both the industry as a whole and [Philip Morris] acted consistently with those purposes. Among other things, they avoided developing contradictory information. Despite the industry's nominal emphasis on the need for further research, the CTR designed its research program to avoid studying the biological effects of tobacco use, the very question that, according to the industry's statements,

required more research. To the extent that [Philip Morris] conducted research on that issue independently of the CTR, it did so in a European laboratory that it purchased, and it was careful to avoid preserving records of the results in this country. [Philip Morris]'s director of research in the late 1970s and 1980s explained to a subordinate that his job was to attack outside research that was inconsistent with the industry's position by casting doubt on it. The jury could also have found that there was a 'gentleman's agreement' not to conduct research beyond what the CTR did. The primary purpose of the CTR's research was to provide expert witnesses for congressional hearings and lawsuits, not to determine the relationship between smoking and disease. The CTR's lawyers, rather than its scientists, established its research priorities; developing accurate information on the biological effects of smoking was not one of the lawyers' priorities.

"The jury could have found that, throughout this period of time, [Philip Morris] and the other tobacco companies actually had little doubt that cigarette smoking was causally related to a number of diseases. In 1958, three British researchers found that the American tobacco scientists with whom they spoke believed that cigarette smoke could cause cancer. In 1961, [Philip Morris]'s director of research stated that cigarette smoke contained so many carcinogens that the best that the company could do was to reduce their amounts. Internal company memoranda agreed and suggested that it could not admit those facts publicly because of adverse legal consequences. At least by the 1970s, there was absolutely no scientific basis for denying the connection between cigarette smoking and cancer and other diseases. However, [Philip Morris] continued to assert that the hazard of cigarette smoking to health was uncertain when it actually knew that there was no legitimate controversy about that subject.

"The jury could also have found that [Philip Morris] recognized both that nicotine was addictive and that its addictive effect was the primary reason that people continued to smoke. [Philip Morris] spent considerable effort discovering ways to deliver the optimal dose of nicotine in each cigarette without actually adding nicotine to its product. It also concluded that, because of nicotine's addictive effect, smoking cessation programs and technologies would be unlikely to work without significant behavioral therapy. In its view, providing smokers a reason to believe that there were serious doubts that tobacco was harmful would discourage smokers from making the effort that was necessary to quit smoking.

"Also, the jury could have found that [Philip Morris] and the industry used a large number of methods to create the public impression of a legitimate controversy, despite the lack of supporting scientific evidence. They issued press releases, influenced the content of apparently neutral articles, cultivated opinion leaders, attempted to use their advertising power to get favorable treatment from the print media, and appeared on commercial and public television to put forth that message. Those individuals who spoke for [Philip Morris] and the industry emphasized that the evidence concerning the dangers of smoking was primarily based on statistical relationships, and they argued that there was no proof that a specific component of tobacco smoke caused a specific disease. Even after the early 1990s, when the industry finally had to admit that tobacco could be a risk factor associated with a number of diseases, it argued that there was a long chain of intervening events before a disease actually arose from cigarette smoking. The industry, including [Philip Morris], also continued to deny that cigarette smoking was addictive and publicized that message throughout the country, including Oregon."

Id. at 531-34, 92 P.3d 126.

Philip Morris and the tobacco industry intended to deceive smokers like Williams, and it did in fact deceive him.

> "As a smoker, Williams was one of the intended recipients of the industry's message, and, in fact, the jury could have found that he received its message and relied on its representations. [The jury further could have found that t]hose representations affected his decision to continue smoking and not to make greater efforts to overcome his addiction. When his family urged him to stop smoking, he responded that he had learned from watching television that smoking did not cause lung cancer. After his diagnosis, he blamed the 'cigarette people' for betraying him—which, given his exclusive use of [Philip Morris]'s products, must at least have included [Philip Morris]. The jury could have found on the evidence before it that, as a result of [Philip Morris]'s representations, Williams suffered his fatal lung cancer. The jury also could have found that Williams was one of thousands of Oregonians who received [Philip Morris]'s message, acted on it, and, like him, suffered cancer or other diseases as a result."

Id. at 534, 92 P.3d 126.

Furthermore, Philip Morris also deceived other smokers in Oregon:

> "Although a tobacco industry survey indicated that 85 percent of smokers wished that they had never started smoking, [Philip Morris] concealed information that the addictive effects of nicotine made it difficult for them to stop without significant assistance. The fraudulent statements from [Philip Morris] and the rest of the industry reinforced those addictive effects by giving smokers a reason not to make the necessary effort to break the addiction. The jury could [have found] on this record that [Philip Morris]'s public relations campaign had precisely the effect that [Philip Morris] intended it to have and that it affected large numbers of tobacco consumers in Oregon

> other than Williams. It is also reasonably inferable from the evidence that [Philip Morris]'s products, used as [Philip Morris] intended them to be used, caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but non-fatal health problems with their attendant economic consequences."

Williams I, 182 Or.App. at 66-67, 48 P.3d 824.[1]

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[1] These last statements reflect the one real disagreement between the parties over the record. Philip Morris claims repeatedly that the record does not show that its fraud injured any party other than Williams. However, its opening brief indicates that Philip Morris does not contest how the Court of Appeals summarized the record. Rather, it argues that plaintiff did not put on any *specific* evidence to show that any *particular* person (other than Williams) continued smoking because of the fraud.

> "There is nothing in the record that supports the Court of Appeals' assumption that any Oregon smoker other than Williams smoked and sustained injuries *in reliance on the alleged fraud.* At most, plaintiff introduced evidence that smoking per se injured non-parties. However, the mere act of selling cigarettes is lawful conduct. Plaintiff never connected the injuries of non-parties to the fraud alleged in this case."

(Emphasis in original.)

In essence, Philip Morris is claiming that one cannot reasonably infer that anyone was actually fooled by its 40-year advertising campaign directed to thousands of Oregonians. Yet even the simplest assessment of human nature, viewed in light of the designedly addictive properties of cigarettes, tells any reasonable person that those lies would have been very persuasive. We think that such an appreciation of human nature fairly may be attributed to jurors, including the ones who heard this case. Moreover, Philip Morris's own conduct belies its protestations. As a for-profit corporation, it would not spend over 40 years of time, effort, and money to deceive people, unless it thought it was succeeding.

II. PROCEDURAL POSTURE

At trial, the jury found in favor of plaintiff on both the negligence and fraud claims, and it awarded compensatory damages of $821,485.50—$21,485.80 in economic damages and $800,000 in noneconomic damages.

As to the negligence claim, the jury found Williams 50% responsible for the damages. The jury declined to award any punitive damages respecting that claim. As to the fraud claim, however, the jury awarded punitive damages of $79.5 million.

The trial court significantly reduced the amounts awarded to the plaintiff. The court "capped" the noneconomic damages at $500,000 pursuant to *former* ORS 18.560 (1999), *renumbered as* ORS 31.710 (2003), thereby producing a total compensatory damage award of $521,485.80.[2] The court also reduced the punitive damage award. The court did conclude that $79.5 million "was within the range a rational juror could assess based on the record as a whole and applying the Oregon common law and statutory factors." Nevertheless, the court concluded, the $79.5 million punitive damage award "was excessive under federal standards." The trial court therefore reduced the punitive damage award to $32 million.

Both plaintiff and Philip Morris appealed to the Court of Appeals. In *Williams I*, the Court of Appeals reversed the trial court on plaintiff's appeal and reinstated the $79.5 million punitive damage award. 182 Or.App. at 72, 48 P.3d 824. It affirmed on Philip Morris's cross-appeal. *Id.* at 47, 48 P.3d 824. The court later adhered to its opinion on reconsideration. *Williams*, 183 Or.App. at 197, 51 P.3d 670. This court denied review. 335 Or. 142, 61 P.3d 938 (2002).

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[2] There is no issue in this case as it comes before us respecting the propriety of the trial court's application of *former* ORS 18.560.

The United States Supreme Court then granted certiorari, vacated the Court of Appeals' judgment, and remanded the case to the Court of Appeals for that court to reconsider the amount of the punitive damages award in light of *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). *Philip Morris USA Inc. v. Williams*, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003). The Court of Appeals did so in *Williams II*, again reversing on plaintiff's appeal and affirming on Philip Morris's cross-appeal. We allowed review.

III. ISSUES ON REVIEW

On review, Philip Morris asks us to consider four issues, which it states as follows:

> "A. Is a defendant entitled to have the jury instructed that any award of punitive damages must bear a reasonable relationship to the harm caused to the plaintiff and that punitive damages cannot be imposed for alleged harm to non-parties?
>
> "B. Are the punitive damages assessed in this case unconstitutionally excessive in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?
>
> "C. Must a plaintiff prove receipt of and reliance upon the defendant's allegedly fraudulent communications when he or she claims that a defendant committed fraud by communicating a false impression to the general public through mass media?
>
> "D. Does the Federal Cigarette Labeling and Advertising Act, 15 USC §§ 1331 *et seq.*, preempt the 'false impression' theory relied upon by the Court of Appeals, which is based in part upon a defendant's failure to disclose information beyond that prescribed by the congressionally mandated warnings?"

We will not consider the third and fourth issues. This court earlier declined review of all the issues decided in *Williams I*. The appeal remained alive only because of, and to the extent that, the United States Supreme Court later directed the Court of Appeals to reconsider its decision respecting the amount of punitive damages in light of *Campbell*. The Court of Appeals performed that limited function in *Williams II*, and we allowed review of that decision. We decline to go beyond the Supreme Court's mandate, and the Court of Appeals' opinion in *Williams II*, to consider issues that this court previously determined were not review-worthy. *See* ORAP 9.20(2) (this court's opinion need not address every question presented on review).

The Supreme Court's decision in *Campbell* clearly relates to the second issue presented by Philip Morris. Philip Morris asserts that *Campbell* also relates to the first issue, regarding jury instructions. Because of that, and because the Court of Appeals addressed both issues in *Williams II*, we will consider those issues here.

IV. DISCUSSION

A. *Overview of State Farm v. Campbell*

We begin by reviewing the United States Supreme Court's opinion in *Campbell*.

The punitive damage award at issue in *Campbell* arose from an insured's action against an insurer for bad faith, fraud, and intentional infliction of emotional distress. 538 U.S. at 414, 123 S.Ct. 1513. Campbell, the insured, had caused an automobile accident that killed one person and permanently disabled another. *Id.* at 412-13, 123 S.Ct. 1513. When Campbell was sued, Campbell's insurer, State Farm, chose to contest liability. *Id.* at 413, 123 S.Ct. 1513. It refused settlement offers that were within policy limits and took the case to trial despite the advice of one of its own investigators, in the process assuring Campbell and his wife

that they would face no personal liability. *Id.* When the jury returned a verdict substantially above the policy limits, State Farm initially refused to cover the excess, telling the Campbells to put "for sale" signs on their property. *Id.* State Farm also refused to post a supersedeas bond to appeal the verdict. *Id.*

In their action against State Farm, the Campbells introduced evidence that State Farm's decision to try the case was part of a nationwide effort to limit payouts on insurance claims. *Id.* at 415, 123 S.Ct. 1513. The evidence "concerned State Farm's business practices for over 20 years in numerous States. Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint against the company." *Id.* The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. *Id.* The trial court reduced the compensatory damages to $1 million and the punitive damages to $25 million. *Id.* On appeal, the Utah Supreme Court reinstated the $145 million punitive damage award. *Id.* The United States Supreme Court granted certiorari. *Id.* at 416, 123 S.Ct. 1513.

The Court first noted that compensatory damages are intended to compensate for a loss, while punitive damages "are aimed at deterrence and retribution." *Id.* However, the Court noted, the Fourteenth Amendment's Due Process Clause prohibits imposing "grossly excessive or arbitrary punishments" on a tortfeasor. *Id.* A person must have fair notice, not just *that* the state will punish certain conduct, but also how severely it will do so. *Id.* at 417, 123 S.Ct. 1513.

The Court identified two risks peculiar to punitive damages. First, although punitive damage awards are similar to criminal sanctions, defendants do not receive the procedural protections required of criminal trials. *Id.* Second, vague jury instructions can leave the jury with too much discretion in choosing the amount of punitive damages, allowing it to ex-

press preexisting biases or to rely too much on tangential or inflammatory evidence. *Id.* at 417-18, 123 S.Ct. 1513. For those reasons, the Court had directed "[e]xacting appellate review" of a jury's punitive damage award, considering three "guideposts" identified in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996):

> "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

Campbell, 538 U.S. at 418, 123 S.Ct. 1513.

The Court then applied those guideposts. The first guidepost, the reprehensibility of defendant's conduct, represents " '[t]he most important indicium of the reasonableness of a punitive damages award.' " *Id.* at 419, 123 S.Ct. 1513 (quoting *Gore*, 517 U.S. at 575, 116 S.Ct. 1589). In analyzing reprehensibility, courts should consider whether

> "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

Id. (citing *Gore*, 517 U.S. at 576-77, 116 S.Ct. 1589).

In analyzing that guidepost in *Campbell*, however, the Court did not itself focus on those five considerations. Instead, it concentrated on how evidence of out-of-state conduct and dissimilar conduct had skewed the reprehensibility analysis against State Farm. The state wrongly relied on such conduct, the Court ruled, because a state cannot punish

a defendant for its lawful conduct in another state, or for conduct that "occurred outside [the state] to other persons." *Id.* at 421, 123 S.Ct. 1513. In *Campbell*, most of the out-of-state conduct was lawful where it took place, and it was not connected to the harm to the Campbells. *Id.* at 422, 123 S.Ct. 1513. Furthermore, the Court held, a state cannot punish a defendant for "dissimilar acts": "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423, 123 S.Ct. 1513. In sum, the Court held that, because the Campbells showed "no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis." *Id.* at 424, 123 S.Ct. 1513.

The second *Gore* guidepost examines the ratio between the punitive damage award and the actual or potential harm to the plaintiff. *Campbell*, 538 U.S. at 424, 123 S.Ct. 1513. The ratio, however, is no mechanical formula. *Id.* ("we have been reluctant to identify concrete constitutional limits on the ratio"); *id.* at 425, 123 S.Ct. 1513 ("[w]e decline again to impose a bright-line ratio"); *id.* ("there are no rigid benchmarks that a punitive damage award may not surpass").

That said, the Court proceeded to give some guidance regarding the second guidepost. Twice in the past, the Court noted, it had suggested that a punitive damage award more than four times compensatory damages "might be close to the line of constitutional impropriety." *Id.* at 425, 123 S.Ct. 1513 (citing *Gore*, 517 U.S. at 581, 116 S.Ct. 1589, and *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)). The Court also had noted previously that, for 700 years, legislatures had authorized double, treble, or quadruple damages as a sanction. *Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 (citing *Gore*, 517 U.S. at 581 & n. 33, 116 S.Ct. 1589). The Court concluded that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant

degree, will satisfy due process." 538 U.S. at 425, 123 S.Ct. 1513.

> "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in [the] range of 500 to 1, or, in this case, of 145 to 1."

Id. (citation omitted).

The Court did acknowledge, however, that even those tentative ratios might be adjusted up or down. A greater ratio might comport with due process if " 'a particularly egregious act has resulted in only a small amount of economic damages,' " if " 'the injury is hard to detect,' " or if " 'the monetary value of noneconomic harm might have been difficult to determine.' " *Id.* at 425, 123 S.Ct. 1513 (quoting *Gore*, 517 U.S. at 582, 116 S.Ct. 1589). With a "substantial" compensatory damage award, however, due process might require "a lesser ratio, perhaps only equal to compensatory damages." *Id.* But "[t]he precise award * * * must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.*

In applying the second *Gore* guidepost, the Court stated that there is "a presumption against an award that has a 145-to-1 ratio." *Id.* at 426, 123 S.Ct. 1513. The Campbells had received a substantial compensatory damage award; they were injured economically, not physically; and State Farm paid the excess verdict before the Campbells sued them, so their economic injuries were minor. *Id.* Additionally, the outrage and humiliation that State Farm caused the Campbells may have been considered twice—once in the compensatory damage award and again in the punitive damage award. *Id.*

The Court also rejected several other factors that the Utah Supreme Court had identified in support of the punitive damage award. For example, the Utah Supreme Court had

pointed to State Farm's wealth. The Court concluded that wealth should not have been considered:

> "While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*. * * * The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *Gore*, 517 U.S., at 585, 116 S.Ct. 1589 ('The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business'); see also *id.*, at 591, 116 S.Ct. 1589 (Breyer, J., concurring) ('[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy * * *. That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as "reprehensibility," to constrain significantly an award that purports to punish a defendant's conduct')."

Id. at 427-28, 123 S.Ct. 1513.

The third guidepost compares the punitive damage award to comparable civil and criminal penalties. *Id.* at 428, 123 S.Ct. 1513. Criminal penalties, however, do not help as much in determining "the dollar amount of the award":

> "Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."

Id.

The comparable civil sanctions in *Campbell* fell well below the punitive damage award. The Court identified only one, a $10,000 fine for fraud. *Id.* The Utah Supreme Court had pointed to other, more substantive penalties, but they were all based on evidence of out-of-state and dissimilar conduct. *Id.*

In all, the Court in *Campbell* found the case "neither close nor difficult," *id.* at 418, 123 S.Ct. 1513, and concluded that $145 million in punitive damages violated due process, *see id.* at 429, 123 S.Ct. 1513 (concluding award was "irrational and arbitrary deprivation" of property). The Court suggested that the guideposts,

> "especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages."

Id. However, the Court concluded, Utah state courts should calculate punitive damages in the first instance. *Id.* at 429, 123 S.Ct. 1513.

With the foregoing principles in mind, we turn to the questions presented on review.

B. *The Trial Court's Refusal to Give Philip Morris's Proposed Jury Instruction No. 34*

Philip Morris first argues that the trial court erred in refusing to give its proposed jury instruction number 34. That instruction stated, in part:

> "The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of

> their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit."

In *Williams I*, the Court of Appeals concluded that that instruction was incorrect under state law. 182 Or.App. at 63-64, 48 P.3d 824. We agree. *See Parrott*, 331 Or. at 563, 17 P.3d 473 (evaluating punitive damage award; "Because defendant's tortious conduct was a routine part of its business practice that it was unwilling to change, we also consider the potential injury that its misconduct may have caused to past, present, and future customers."). That is, the jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large.

Philip Morris, however, contends that *Campbell* overrules state rules like the one set out in *Parrott*. Specifically, Philip Morris asserts that *Campbell* prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties.[3] In support of that argument, Philip Morris quotes the following from Campbell:

> "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis * * *. * * * Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. *Gore*, *supra*, [517 U.S.] at 593 (Breyer, J., concurring) ('Larger damages might also

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[3] Philip Morris does not explain how its instruction summarizes its interpretation of *Campbell*. It is unclear to us how a jury could "consider" harm to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all.

> "double count" by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover')."

538 U.S. at 423, 123 S.Ct. 1513.

We think that Philip Morris takes the foregoing quoted material from *Campbell* out of context. The quote referred only to *dissimilar* acts and dissimilar claims; the Court intended to prohibit a punitive damage award from becoming a referendum on a corporate defendant's general behavior as a citizen. The full paragraph in *Campbell* states:

> "For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter *conduct that bore no relation to the Campbells' harm.* A defendant's *dissimilar acts, independent from the acts upon which liability was premised,* may not serve as the basis for punitive damages. *A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.* Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. [*Campbell v. State Farm Mut. Auto. Ins. Co.*,] 65 P.3d [1134], at 1149 [(Utah 2001)] ('Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: "The harm is minor to the individual but massive in the aggregate" '). Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. *Gore, supra,* [517 U.S.] at 593, 116 S.Ct. 1589 (Breyer, J., concurring) ('Larger damages might also "double count" by including in the

> punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover')."

538 U.S. at 422-23, 123 S.Ct. 1513 (emphasis added).

Considering the foregoing material as a whole, we conclude that evidence of *similar* conduct against other parties may be relevant to a punitive damage award. The Court criticized the Utah courts only for allowing in evidence of *dissimilar* conduct:

> "The Campbells have identified scant evidence of repeated misconduct *of the sort that injured them.* * * * Although *evidence of other acts need not be identical to have relevance in the calculation of punitive damages*, the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length. * * * The reprehensibility guidepost *does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance*, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm *similar to that which harmed them*, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis."

Id. at 423-24, 123 S.Ct. 1513 (emphasis added). *See also id.* at 427, 123 S.Ct. 1513 ("The failure of the company to report the Texas award is out-of-state conduct that, *if the conduct were similar*, might have had some bearing on the degree of reprehensibility, subject to the limitations we have described." (emphasis added)).

Philip Morris's proposed jury instruction would have prohibited the jury from "punish[ing] the defendant for the impact of its alleged misconduct on other persons," even if those other persons were Oregonians who were harmed by the same conduct that had harmed Williams, and in the same

way. As we noted, that is not correct as an independent matter of Oregon law respecting the conduct of jury trials and instructions that are given to juries. Neither, as we read in *Campbell*, does it correctly state federal due process law. Because the proposed jury instruction did not accurately reflect the law, the trial court did not commit reversible error when it refused to give it. *See Hernandez v. Barbo Machinery Co.*, 327 Or. 99, 106, 957 P.2d 147 (1998) (trial court's refusal to give requested jury instruction "is no[t] error if the requested instruction is not correct in all respects").

Philip Morris also claims that the trial court committed reversible error because the jury instructions that *were* given did not accurately reflect some aspects of *Campbell's* holding. But Philip Morris did not preserve that argument before the Court of Appeals. *See* ORAP 5.45(1) ("No matter claimed as error will be considered on appeal unless the claimed error * * * is assigned as error in the opening brief * * *."); *Ailes v. Portland Meadows, Inc.*, 312 Or. 376, 380, 823 P.2d 956 (1991) (to preserve error, "the adversely affected party must have * * * raised the issue on appeal by an assignment of error in its opening brief"). Fairly read, Philip Morris's assignment of error in the Court of Appeals claimed only that the trial court erred in refusing to give requested instruction number 34. That narrow assignment of error did not give the Court of Appeals notice that it needed to consider any challenge to the instructions actually given.

Based on the foregoing discussion, we affirm the Court of Appeals on the first issue.

C. *The Punitive Damage Award and Federal Due Process*

On review of a punitive damage award under the Due Process Clause of the Fourteenth Amendment, a court must determine whether the punitive damage award is " 'grossly excessive'." *Parrott*, 331 Or. at 554, 17 P.3d 473 (emphasis deleted; citing *Gore*, 517 U.S. at 568, 116 S.Ct. 1589).

Whether the verdict exceeds the gross excessiveness standard is a question of law. *Id.* at 555, 17 P.3d 473.

In *Parrott*, this court identified five factors to be considered to determine whether a punitive damage award is grossly excessive:

> "[T]he range that a rational juror would be entitled to award depends on the following: (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue; (2) the state interests that a punitive damages award is designed to serve; (3) the degree of reprehensibility of the defendant's conduct; (4) the disparity between the punitive damages award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for comparable misconduct."

Id. (citations omitted). *Parrott* has been superseded somewhat by *Campbell*, but the last three *Parrott* factors are, of course, the *Gore* guideposts as they have been further elucidated by *Campbell*. We consider only those guideposts in the following analysis.

The first guidepost directs us to consider, based on the facts contained in the record, how reprehensible Philip Morris's conduct was. As noted, we consider whether:

> "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

Campbell, 538 U.S. at 419, 123 S.Ct. 1513 (citing *Gore*, 517 U.S. at 576-77, 116 S.Ct. 1589). And, as we have explained, the jury, in assessing the reprehensibility of Philip Morris's

actions, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct.

Again, we construe all facts in favor of plaintiff, the party in whose favor the jury ruled. Doing so, there can be no dispute that Philip Morris's conduct was extraordinarily reprehensible. Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue. It deliberately did so to keep smokers smoking, knowing that it was putting the smokers' health and lives at risk, and it continued to do so for nearly half a century.

Philip Morris's fraudulent scheme would have kept many Oregonians smoking past the point when they would otherwise have quit. Some of those smokers would eventually become ill; some would die. Philip Morris's deceit thus would, naturally and inevitably, lead to significant injury or death.

Although it weighs less in our analysis, we also note that Philip Morris harmed a much broader class of Oregonians. Every smoker tricked by its scheme, even those who never got ill, kept buying cigarettes—taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies. And every one of those smokers *risked* serious illness or death for as long as they remained deceived.

Of the five reprehensibility factors listed in *Gore* and recited—if not precisely used—in *Campbell*, four certainly are met here. The harm to Williams was physical—lung cancer cost Williams his life. Philip Morris showed indifference to and reckless disregard for the safety not just of Williams, but of countless other Oregonians, when it knowingly spread false or misleading information to keep smokers smoking. Philip Morris's actions were no isolated incident, but a carefully calculated program spanning decades. And Philip Mor-

ris's wrongdoing certainly involved trickery and deceit.[4] We conclude, then, that the first *Gore* guidepost favors a very significant punitive damage award.

We also conclude that the third *Gore* guidepost—comparable civil or criminal sanctions—favors plaintiff. In examining that guidepost, however, we believe that it is important to correct two errors that the Court of Appeals committed in applying it.

In *Williams I*, the Court of Appeals suggested that, because the comparable sanctions guidepost was about notice to a prospective defendant, "the established Oregon law of punitive damages, including ORS 30.925(2)," gave Philip Morris adequate notice here. 182 Or.App. at 72, 48 P.3d 824. That was not correct.

Courts consider comparable sanctions for two reasons. First, comparable sanctions suggest a legislative determination about what constitutes an appropriate sanction for the conduct, a determination that is entitled to "substantial deference." *Gore*, 517 U.S. at 583, 116 S.Ct. 1589 (internal quotation marks and citation omitted). Second, comparable sanctions may give a defendant fair notice of the penalties that the conduct may carry. *Id.* at 584, 116 S.Ct. 1589 ("None of these statutes would provide an out-of-state distributor with fair notice that the first violation—or, indeed the

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[4] Only one factor arguably is not met: There is no evidence that Williams was especially financially vulnerable. Plaintiff argues that Williams was vulnerable in another way, because he was addicted to cigarettes and so more susceptible to Philip Morris's deceptive message. *Gore* indirectly suggests that reprehensibility may include other sorts of vulnerability than financial. *See* 517 U.S. at 576, 116 S.Ct. 1589 (suggesting that higher punitive damages are appropriate, even though the injury is *solely economic*, if "the target is financially vulnerable"). However, as we will discuss, we would affirm this punitive damage award even if that factor was not met.

first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty.").

Those reasons explain why we conclude that the Court of Appeals misunderstood the guidepost. Neither Oregon law generally, nor ORS 30.925(2) specifically,[5] suggest how severely the state may choose to punish Philip Morris's conduct. Thus, they do not independently provide a legislative standard entitled to substantial deference. If the Court of Appeals' analysis were correct, then the third *Gore* guidepost would always support *any* punitive damage award, *i.e.*, the mere existence of the award would justify itself automati-

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[5] ORS 30.925 provides, in part:

> "(2) Punitive damages, if any, shall be determined and awarded based upon the following criteria:
>
> "(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
>
> "(b) The degree of the defendant's awareness of that likelihood;
>
> "(c) The profitability of the defendant's misconduct;
>
> "(d) The duration of the misconduct and any concealment of it;
>
> "(e) The attitude and conduct of the defendant upon discovery of the misconduct;
>
> "(f) The financial condition of the defendant; and
>
> "(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

Of course, those criteria were established without the benefit of the *Campbell* decision, and may be applied only to the extent that they comport with that decision.

cally, regardless of the amount awarded. That reasoning is circular, and we reject it.

In *Williams I*, the Court of Appeals also suggested that the comparable sanctions guidepost does not "play[ ] a major role one way or the other," because it concluded that there were no comparable civil penalties and that criminal penalties were not truly comparable. 182 Or.App. at 72, 48 P.3d 824. Although it is not clear to us that the foregoing statement correctly interprets and applies the law as *Campbell* now explicates that law, we need not pursue that issue definitively here. That is true, because applying the comparable sanctions guidepost involves more than just asking whether the dollar amount of the sanction equals or exceeds the punitive damage award. *Campbell* proves that. There, the most relevant civil sanction was $10,000; the Court found that civil sanction was "dwarfed" by the $145 million punitive damage award. 538 U.S. at 428, 123 S.Ct. 1513. Yet the Court approved a punitive damage award "at or near the amount of compensatory damages," *id.* at 429, 123 S.Ct. 1513, *i.e.*, an award somewhere around $1 million. And a $1 million punitive damage award was still 100 times the comparable sanction.

So far as we can discern from *Campbell*, then, the "comparable sanctions" guidepost requires three steps. First, courts must identify comparable civil or criminal sanctions. Second, courts must consider how serious the comparable sanctions are, relative to the universe of sanctions that the legislature authorizes to punish inappropriate conduct. Third, courts must then evaluate the punitive damage award in light of the relative severity of the comparable sanctions. The guidepost may militate against a significant punitive damage award if the state's comparable sanctions are mild, trivial, or nonexistent. However, the guidepost will support a more significant punitive damage award when the state's comparable sanctions are severe.

We turn, then, to consider the facts of this case, in light of the guideposts and the Fourteenth Amendment. If there are comparable civil sanctions, the parties did not cite them to us and we have not found them by independent investigation.

There are what we consider to be comparable criminal sanctions, but we must exercise care when relying on them. As the Court took pains to caution in *Campbell*:

> "The existence of a criminal penalty does have [a] bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."

538 U.S. at 428, 123 S.Ct. 1513. That admonition is important, of course. But the basis for holding that Philip Morris's actions in this case compare to a familiar crime is not speculative or remote. Viewing the facts in the light most favorable to plaintiff, Philip Morris's actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter. *See* ORS 163.040 (1953).[6] Today, its actions would constitute at least second-

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[6] In 1953, that statute provided, in part:

> "(2) Any person who, in the commission of * * * a lawful act without due caution or circumspection, involuntarily kills another, is guilty of manslaughter. * * *
>
> "(3) Every killing of a human being by the act, procurement or culpable negligence of another, when the killing is not murder in the first or second degree, or is not justifiable or excusable

degree manslaughter, a Class B felony. *See* ORS 163.125(1)(a).[7] Individuals who commit Class B felonies may face up to 10 years in prison and a fine of up to $250,000. ORS 161.605(2) (term of imprisonment); ORS 161.625(1)(c) (fine). Corporations that commit a felony of any class may be fined up to $50,000, or required to pay up

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or negligent homicide as provided in ORS 163.090 [negligent homicide by operation of motor vehicle], is manslaughter."

[7] The Oregon statutes generally define criminal homicide as follows:

"A person commits criminal homicide if, without justification or excuse, the person intentionally, knowingly, recklessly or with criminal negligence causes the death of another human being."

ORS 163.005(1).

Second-degree manslaughter is a specific category of criminal homicide:

"(1) Criminal homicide constitutes manslaughter in the second degree when:

"(a) It is committed recklessly[.]

" * * * * *

"(2) Manslaughter in the second degree is a Class B felony."

ORS 163.125.

Reckless conduct is defined in ORS 161.085(9):

" 'Recklessly,' when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

to twice the amount that the corporation gained by committing the offense. ORS 161.655(1)(a) and (3). Thus, the possibility of severe criminal sanctions, both for any individual who participated and for the corporation generally, put Philip Morris on notice that Oregon would take such conduct very seriously.[8] We conclude that the third guidepost, like the first, supports a very significant punitive damage award.

The same cannot be said of the second *Gore* guidepost. As noted, that guidepost considers the ratio between the punitive damage award and the compensatory damage award. The numerator of the ratio is fixed by the punitive damage award: $79.5 million.

To determine the denominator of the ratio, we consider not only the harm actually suffered by plaintiff, but also the potential harm to plaintiff. *See Campbell*, 538 U.S. at 418, 123 S.Ct. 1513 ("actual or potential harm suffered by the plaintiff"); *id.* at 424, 123 S.Ct. 1513 (ratio "between harm, or potential harm, to the plaintiff and the punitive damages award"). Plaintiff suffered relatively small economic damages for Williams's wrongful death—less than $25,000. However, that low figure occurred only because Williams died shortly after being diagnosed with cancer. If Williams had lived long enough to incur substantial medical bills, for example, economic damages could easily have been 10 or more times the amount awarded here. Only chance saved

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[8] The fines and periods of imprisonment have changed over the many years that Philip Morris carried out its scheme. In 1953, for example, manslaughter carried a much longer prison term (15 years), but a much lower fine ($5,000). ORS 163.080 (1953). The point, however, is that reckless conduct like Philip Morris's, when it resulted in death (as it did here), always has constituted a criminal act to which attached a severe potential criminal penalty.

Philip Morris from a much higher compensatory damage award.[9]

In analyzing the ratio of punitive to compensatory damages, the Court of Appeals also added to the compensatory damages calculus the estimated harm to others. *Williams II*, 193 Or.App. at 562, 92 P.3d 126 (estimating that 100 Oregonians had been harmed by Philip Morris's scheme, and so concluding ratio was less than 4:1).

Using harm to others as part of the ratio may have been correct under the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (Stevens, J., joined by Rehnquist, C. J., and Blackmun, J.) (relationship between actual and punitive damages should consider "the possible harm to other victims that might have resulted if similar future behavior were not deterred"). However, it no longer ap-

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[9] One sentence in *Campbell* suggested that a small award of " '*economic damages*' " might, when combined with particularly egregious conduct, justify a higher ratio. 538 U.S. at 425, 123 S.Ct. 1513 (quoting *Gore*, 517 U.S. at 582, 116 S.Ct. 1589; emphasis added).

We conclude, however, that the Court meant compensatory damages generally, not economic damages specifically. *See id.* ("The converse is also true, however. When *compensatory* damages are substantial, then a lesser ratio * * * can reach the outermost limit of the due process guarantee." (emphasis added)); *see also id.* at 426, 123 S.Ct. 1513 (expressing concern that compensatory damages might have included outrage or humiliation component duplicated in punitive damage award). That accords with *Gore*, 517 U.S. at 582, 116 S.Ct. 1589 ("[L]ow awards of *compensatory* damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." (emphasis added)).

pears to be permissible (if it ever was) to factor in that consideration. Although *Campbell* held that similar acts could bear on reprehensibility (discussed above), it now appears that harm to others should not be considered as part of the ratio guidepost. *See* 538 U.S. at 426-27, 123 S.Ct. 1513 ("Since the Supreme Court of Utah discussed the Texas award when applying the ratio guidepost, we discuss it here. The Texas award, however, should have been analyzed in the context of the *reprehensibility guidepost only*." (emphasis added)); *see also id.* at 427, 123 S.Ct. 1513 (had Texas award involved similar conduct, it "might have had some bearing on the degree of reprehensibility"); *Gore*, 517 U.S. at 582-83, 116 S.Ct. 1589 (Court used 500:1 as ratio, although Court noted in 35 that ratio would have been 35:1 if damages to other Alabama consumers had been included). From the foregoing, we conclude that the ratio guidepost considers only harm to the plaintiff. *See Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 (precise award must be based on "the defendant's conduct and the harm *to the plaintiff*" (emphasis added)); *id.* at 426, 123 S.Ct. 1513 (punishment must be "reasonable and proportionate to the amount of *harm to the plaintiff* and to the general damages recovered" (emphasis added)).

There also is some imprecision regarding what amount we should use for noneconomic damages—is it the $800,000 awarded by the jury, or the $500,000 awarded by the trial court after applying the statutory cap? We need not decide between the "capped" or "uncapped" figure, however, because it makes no difference here. Either way, the second *Gore* guidepost is not met. All arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the Court has said ordinarily will apply in the usual case. *See Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 (so stating).

In *Williams II*, the Court of Appeals also relied on Philip Morris's wealth to conclude that the jury's punitive damage award did not violate due process. 193 Or.App. at 563, 92

P.3d 126. Philip Morris objects that *Campbell* prohibits using wealth in that way. We agree. Wealth "cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427, 123 S.Ct. 1513. If a punitive damage award is grossly excessive under *Gore* and *Campbell*, then the defendant's wealth will not make it constitutional. In short, wealth is not a fourth *Gore* guidepost.

However, *Campbell* did not otherwise remove wealth from the punitive damage equation, as Philip Morris asserts. A jury still may levy a higher punitive damage award against a wealthy defendant, as long as the final punitive damage award does not exceed the constitutional limits established by the three *Gore* guideposts. *Id.* at 427, 123 S.Ct. 1513 (wealth "cannot justify an *otherwise unconstitutional* punitive damages award," indicating that punitive damage award could be constitutional even though jury considered wealth (emphasis added)); *see id.* at 428, 123 S.Ct. 1513 (wealth is not " 'unlawful or inappropriate' "factor (quoting *Gore*, 517 U.S. at 591, 116 S.Ct. 1589 (Breyer, J., concurring))). Consistently with the foregoing, Oregon law specifically permits a jury to consider a defendant's financial condition when it imposes a punitive damage award. ORS 30.925(2)(f).

Of the three *Gore* guideposts, then, two support a very significant punitive damage award. One guidepost—the ratio—cuts the other way. In the end, we are left to use those competitive tools to assess whether the jury's punitive damage award was not "grossly excessive" and therefore should be reinstated.

The *Gore* guideposts are not bright-line tests. *See, e.g.*, *Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 ("there are no rigid benchmarks that a punitive damages award may not surpass"); *see also Gore*, 517 U.S. at 582, 116 S.Ct. 1589 ("we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"). In other words, the guideposts are only that—guideposts. *Gore*

also referred to them as indicia. 517 U.S. at 575, 116 S.Ct. 1589 (reprehensibility is "most important indicium"); *id.* at 580, 116 S.Ct. 1589 (ratio is "second and perhaps most commonly cited indicium"); *id.* at 583, 116 S.Ct. 1589 (comparable sanctions "provides a third indicium for excessiveness"). *Campbell* specifically contemplated that *some* awards exceeding single-digit ratios would satisfy due process. *See id.* at 425, 123 S.Ct. 1513 ("in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"). Single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.

And this is by no means an ordinary case. Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware. It put a significant number of victims at profound risk for an extended period of time. The State of Oregon treats such conduct as grounds for a severe criminal sanction, but even that did not dissuade Philip Morris from pursuing its scheme.

In summary, Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group. Under such extreme and outrageous circumstances, we conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process, as we understand that standard to relate to punitive damage awards. It follows that the Court of Appeals correctly held that the trial court should have entered judgment against Philip Morris for the full amount of the jury's punitive damage award.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

APPENDIX B

OREGON COURT OF APPEALS OPINION

193 Ore. App. 527, 92 P.3d 126

Court of Appeals of Oregon.

MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS, *Deceased, Appellant-Cross-Respondent,*

v.

PHILIP MORRIS INCORPORATED, *Respondent-Cross-Appellant,*

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., AND PHILIP MORRIS COMPANIES, INC., *Defendants.*

9705-03957; A106791.

Submitted on Remand Nov. 17, 2003.

Decided June 9, 2004.

Before EDMONDS, Presiding Judge, and ARMSTRONG and WOLLHEIM, Judges.

EDMONDS, P.J.

This case comes to us on remand from the United States Supreme Court. *Philip Morris USA Inc. v. Williams*, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003). We previously reversed the trial court's reduction of the jury's award of punitive damages on plaintiff's fraud claim and remanded the case with instructions to enter judgment on the verdict. We affirmed on defendant's cross-appeal. *Williams v. Philip Morris Inc.*, 182 Or.App. 44, 48 P.3d 824, *adh'd to on recons.*, 183 Or.App. 192, 51 P.3d 670, *rev. den.*, 335 Or. 142, 61 P.3d 938 (2002). The Court thereafter granted defen-

dant's petition for a writ of *certiorari*, vacated our decision, and remanded the case for reconsideration in light of its recent decision in *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (*State Farm*). On remand, we reach the same result that we reached in our previous decision.

We readopt our previous opinion in all respects that are not superseded by our discussion in this opinion, including our statement of the facts and our resolution of issues of Oregon and federal law. Our failure to discuss any issue that defendant raises on remand indicates that we are satisfied with our previous resolution of that issue. We begin by summarizing the facts that we described in our previous opinion, again construing the evidence most favorably to plaintiff because of the verdict in her favor. These then are the facts that the jury could have found on the evidence before it.

Plaintiff is the widow of Jesse D. Williams (Williams) and the personal representative of his estate. Defendant is a leading manufacturer of cigarettes and currently has about half of the domestic market for that product. From the early 1950s until his death from a smoking-related lung cancer in 1997, Williams smoked defendant's cigarettes, primarily its Marlboro brand, eventually developing a habit of three packs a day. At that point, he spent half his waking hours smoking and was highly addicted to tobacco, both physiologically and psychologically. Although, at the urging of his wife and children, he made several attempts to stop smoking, each time he failed, in part because of his addiction. Despite the increasing amount of information that linked smoking to health problems during this period, Williams resisted accepting or attempting to act on it. When his family told him that cigarettes were dangerous to his health, he replied that the cigarette companies would not sell them if they were as dangerous as his family claimed. When one of his sons tried to get him to read articles about the dangers of smoking, he responded by finding published assertions that cigarette smok-

ing was not dangerous. However, when Williams learned that he had inoperable lung cancer he felt betrayed, stating "those darn cigarette people finally did it. They were lying all the time." He died about six months after his diagnosis.

In resisting the information about the dangers of smoking, Williams was responding to a campaign that defendant, together with the rest of the tobacco industry, created and implemented for the purpose of undercutting the effect of that information. During most of that campaign, the industry did not expressly assert that cigarettes were safe because it knew that it could never prove their safety. Instead, defendant and the industry attempted to make it appear that the evidence against cigarettes was sufficiently uncertain so that smokers would find a reason to justify their continued smoking. To achieve that result, defendant and the rest of the industry worked together for more than 40 years to create a public impression that there was a legitimate controversy about whether cigarettes were dangerous to a smoker's health and that resolving that health issue would require further research. Although defendant and the other companies knew throughout most, if not all, of that 40-year period that cigarette smoking was in fact dangerous, they intended that smokers rely on the false impression that the industry created.

The industry established its strategy and began developing its public image in response to a decline in cigarette sales in 1953 that was the apparent result of studies that showed that cigarette tar could cause cancer in mice and that established the existence of statistical correlations between smoking and lung cancer. The first public joint effort by the industry occurred in January 1954, when defendant and other tobacco companies published a joint statement in 448 newspapers throughout the country. In that statement, among other things, they announced the creation of the Tobacco Industry Research Committee (TIRC), one of whose stated goals was to conduct research into "all phases of tobacco use

and health." In 1964, the year of the Surgeon General's report on the hazard of smoking to health, the industry divided the TIRC into two parts, one of which, the Council on Tobacco Research (CTR), continued to support scientific research. The other part, named the Tobacco Institute, focused on public relations and lobbying.

Between 1954 and the 1990s, those organizations developed and promoted an extensive campaign to counter the effects of negative scientific information on cigarette sales. The individual tobacco companies, including defendant, were part of the organizations and acted in cooperation with them. At first, the industry publicly denied that there was a problem; for example, in the 1950s and early 1960s, defendant's officials told the public that defendant would "stop business tomorrow" if it believed that its products were harmful. For most of that period, however, the industry did not attempt to refute the scientific information directly; rather, it tried to find ways to create doubts about it. The industry's goal was to create the impression that scientists disagreed about whether cigarette smoking was dangerous, that the industry was vigorously conducting research into the issue, and that a definitive answer would not be possible until that research was complete. As one of defendant's vice-presidents explained in an internal memo, the purpose was to give smokers a psychological crutch and a self-rationale that would encourage them to continue smoking. A Tobacco Institute internal memorandum similarly described the industry's purpose to provide smokers "ready-made credible alternatives" to the evidence of the dangers of smoking.

Both the industry as a whole and defendant acted consistently with those purposes. Among other things, they avoided developing contradictory information. Despite the industry's nominal emphasis on the need for further research, the CTR designed its research program to avoid studying the biological effects of tobacco use, the very question that, according to the industry's statements, required more research.

To the extent that defendant conducted research on that issue independently of the CTR, it did so in a European laboratory that it purchased, and it was careful to avoid preserving records of the results in this country. Defendant's director of research in the late 1970s and 1980s explained to a subordinate that his job was to attack outside research that was inconsistent with the industry's position by casting doubt on it. The jury could also have found that there was a "gentleman's agreement" not to conduct research beyond what the CTR did. The primary purpose of the CTR's research was to provide expert witnesses for congressional hearings and lawsuits, not to determine the relationship between smoking and disease. The CTR's lawyers, rather than its scientists, established its research priorities; developing accurate information on the biological effects of smoking was not one of the lawyers' priorities.

The jury could have found that, throughout this period of time, defendant and the other tobacco companies actually had little doubt that cigarette smoking was causally related to a number of diseases. In 1958, three British researchers found that the American tobacco scientists with whom they spoke believed that cigarette smoke could cause cancer. In 1961, defendant's director of research stated that cigarette smoke contained so many carcinogens that the best that the company could do was to reduce their amounts. Internal company memoranda agreed and suggested that it could not admit those facts publicly because of adverse legal consequences. At least by the 1970s, there was absolutely no scientific basis for denying the connection between cigarette smoking and cancer and other diseases. However, defendant continued to assert that the hazard of cigarette smoking to health was uncertain when it actually knew that there was no legitimate controversy about that subject.

The jury could also have found that defendant recognized both that nicotine was addictive and that its addictive effect was the primary reason that people continued to smoke. De-

fendant spent considerable effort discovering ways to deliver the optimal dose of nicotine in each cigarette without actually adding nicotine to its product. It also concluded that, because of nicotine's addictive effect, smoking cessation programs and technologies would be unlikely to work without significant behavioral therapy. In its view, providing smokers a reason to believe that there were serious doubts that tobacco was harmful would discourage smokers from making the effort that was necessary to quit smoking.

Also, the jury could have found that defendant and the industry used a large number of methods to create the public impression of a legitimate controversy, despite the lack of supporting scientific evidence. They issued press releases, influenced the content of apparently neutral articles, cultivated opinion leaders, attempted to use their advertising power to get favorable treatment from the print media, and appeared on commercial and public television to put forth that message. Those individuals who spoke for defendant and the industry emphasized that the evidence concerning the dangers of smoking was primarily based on statistical relationships, and they argued that there was no proof that a specific component of tobacco smoke caused a specific disease. Even after the early 1990s, when the industry finally had to admit that tobacco could be a risk factor associated with a number of diseases, it argued that there was a long chain of intervening events before a disease actually arose from cigarette smoking. The industry, including defendant, also continued to deny that cigarette smoking was addictive and publicized that message throughout the country, including Oregon.

As a smoker, Williams was one of the intended recipients of the industry's message, and, in fact, the jury could have found that he received its message and relied on its representations. Those representations affected his decision to continue smoking and not to make greater efforts to overcome his addiction. When his family urged him to stop smoking,

he responded that he had learned from watching television that smoking did not cause lung cancer. After his diagnosis, he blamed the "cigarette people" for betraying him—which, given his exclusive use of defendant's products, must at least have included defendant. The jury could have found on the evidence before it that, as a result of defendant's representations, Williams suffered his fatal lung cancer. The jury also could have found that Williams was one of thousands of Oregonians who received defendant's message, acted on it, and, like him, suffered cancer or other diseases as a result.

In our previous opinion, we described the requirements for proving a fraud claim in Oregon and explained why the jury could have found that plaintiff had proven fraud in this case. In short, the jury could have found that defendant, by itself and through the industry effort of which it was a part, intentionally made the false representation that there was a legitimate controversy about the health effects of cigarette smoking, that defendant knew that that representation was false, that Williams relied on it, that he thereafter continued to smoke, and that he suffered his fatal lung cancer as a result of that reliance. *Williams,* 182 Or.App. at 49-70, 48 P.3d 824. Based on the evidence, the jury awarded plaintiff compensatory damages of $21,485.80 in economic damages and $800,000 in noneconomic damages on that claim. In accordance with *former* ORS 18.560(1) (1999), *renumbered as* ORS 31.710(1) (2003), the trial court reduced the amount of noneconomic damages to $500,000 when it entered judgment.

In addition to compensatory damages, the jury awarded plaintiff punitive damages of $79.5 million, which the trial court reduced to $32 million. In our previous opinion, we reinstated the jury's verdict on those damages. The issue before us on remand is the extent to which that award of punitive damages is consistent with the Due Process Clause of the Fourteenth Amendment, particularly as the Court interpreted it in *State Farm.* In our previous opinion, we followed the

Oregon Supreme Court's decision in *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001), in deciding the federal constitutional issue. Now, on remand from the United States Supreme Court, we determine whether our earlier decision is consistent with the Supreme Court's discussion in *State Farm*. We begin that analysis by reviewing earlier United States Supreme Court cases on punitive damages, cases that provide the context for understanding the Court's decision in *State Farm*.

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), is the first case in which the Court considered the effect of the Due Process Clause on the size of an award of punitive damages.[10] In *Haslip*, the defendant Ruffin, an agent and employee of the defendant insurance company, sold life insurance issued by the defendant company, together with health insurance issued by an unrelated company, to an Alabama municipality of which the plaintiffs were employees. Ruffin had the municipality send the premiums for the insurance to him at the company's branch office, rather than to the insurers directly, but he did not forward the premiums to either insurer. As a result of its failure to receive premiums, the health insurer sent notices that the insurance had lapsed for nonpayment to the plaintiffs, in care of Ruffin at the defendant company's branch office. Ruffin did not forward those notices to the plaintiffs. When the plaintiff Haslip sought medical services, she learned that she was uninsured and that she was personally liable for the charges that she had incurred. She was unable to pay her medical bills, and her physician placed her account with a collection agency. The agency obtained a

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[10] The Court had previously rejected challenges to punitive damages under the Excessive Fines Clause of the Eighth Amendment. In several other cases, it had noted the possibility of a due process challenge but concluded that the issue was not properly raised. *See Haslip*, 499 U.S. at 9-12, 111 S.Ct. 1032.

judgment against her, adversely affecting her credit. *Haslip*, 499 U.S. at 4-5, 111 S.Ct. 1032.

The plaintiffs sued Ruffin and the defendant company for fraud. The jury returned general verdicts for damages for all plaintiffs. The verdict for Haslip was $1,040,000, which, the Court assumed, consisted of $200,000 in compensatory damages (the maximum amount that Haslip's attorney requested in his closing argument) and $840,000 in punitive damages. The Alabama Supreme Court affirmed the award, and the United States Supreme Court granted *certiorari*. *Haslip*, 499 U.S. at 5-8, 111 S.Ct. 1032. In its opinion, the Court first held that the Alabama common-law rule that made the company vicariously liable for punitive damages for its employee's fraud did not violate due process. *Id.* at 12-15, 111 S.Ct. 1032. It then turned to the constitutionality of the award of punitive damages.

The Court began by concluding that the common-law method of assessing punitive damages—initially by a jury that is instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct, followed by trial and appellate court review—is consistent with due process. *Haslip*, 499 U.S. at 15-18, 111 S.Ct. 1032. It then evaluated whether the award to Haslip was constitutionally acceptable. It observed that, although it is not possible to draw a mathematical bright line between the constitutionally acceptable and the unacceptable, the reasonableness of the award and whether the jury received adequate guidance from the court are significant considerations. The trial court had expressly instructed the jury on the purposes of punitive damages—not to compensate but to punish and to deter future conduct. That instruction operated to limit the jury's discretion. In addition, under Alabama law, the jury did not receive evidence of the defendant's wealth, and the court told the jury that whether to award punitive damages at all was within its discretion. Thus, the jury's discretion in determining punitive

damages was no greater than it would have been in many other areas of law. *Id.* at 18-20, 111 S.Ct. 1032.

Alabama had also provided significant judicial review of the jury's award. Before *Haslip*, the Alabama Supreme Court had established procedures for a trial court to evaluate a jury award of punitive damages, including requiring the court to place the reasons for its decision in the record. In addition, Alabama provided appellate review of the criteria that it had previously established to ensure that punitive damage awards were reasonable in amount and rational in light of their purpose. *Haslip*, 499 U.S. at 20-21, 111 S.Ct. 1032. The Court concluded that those criteria imposed a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. It especially noted that factfinders who are asked to award punitive damages must be guided by more than the defendant's net worth. The Court said, "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 22, 111 S.Ct. 1032.

After concluding that the defendant had received the full panoply of protections that Alabama provided, the Court mentioned that the award was more than four times the compensatory damages, more than 200 times Haslip's out-of-pocket expenses, and considerably in excess of a fine for insurance fraud. However, it concluded that, although "the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria." *Haslip*, 499 U.S. at 23, 111 S.Ct. 1032. The Court therefore affirmed the judgment for the plaintiff. *Id.* at 23-24, 111 S.Ct. 1032.

The next case that the Court considered, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (TXO), arose out of a property dispute between two energy companies. TXO, the defendant, agreed to purchase rights to develop gas and oil on

property where the plaintiff Alliance Resources controlled the major share of the rights. The agreement was subject to TXO's attorney determining that Alliance's title to the property was valid. In the process of making that determination, TXO discovered a 1958 deed that conveyed the coal mining rights on the property to another party. Although both the wording of the deed and interviews with the parties involved made it clear that the grantor had not conveyed oil and gas rights, TXO paid for a quitclaim deed from the owner of the coal rights and attempted to renegotiate its agreement with Alliance. It also unsuccessfully attempted to induce the grantor of the 1958 deed to execute a false affidavit to the effect that the deed included oil and gas rights. *Id.* at 447-49, 113 S.Ct. 2711.

When its other efforts failed, TXO filed an action to quiet title based on the quitclaim deed, although it knew at the time that its action was frivolous. TXO's real reason for filing the action was to reduce its royalty payments under its agreement with Alliance. The trial court dismissed TXO's action based on the wording of the 1958 deed alone, holding that that deed made the quitclaim deed a nullity. On Alliance's counterclaim for slander of title, the jury awarded it $19,000 in actual damages—the cost of defending the quiet title action—and $10 million in punitive damages. There was evidence that TXO was a large company in its own right, that it was a wholly owned subsidiary of an even larger company, that the amount of royalties that it sought to renegotiate was substantial, and that it had engaged in similar nefarious activities in its business dealings in other parts of the county. *TXO*, 509 U.S. at 449-51, 113 S.Ct. 2711. The trial court refused to reduce the amount of punitive damages, and the West Virginia Supreme Court affirmed. *Id.* at 452, 113 S.Ct. 2711.

On *certiorari*, the United States Supreme Court affirmed the judgment, with Justice Stevens writing the plurality opinion. Chief Justice Rehnquist and Justice Blackmun joined in full, and Justice Kennedy did so in part. Justice Kennedy also

wrote a concurrence, as did Justice Scalia, with whom Justice Thomas joined. The remaining justices joined Justice O'Connor's dissent. The plurality first noted that, assuming that the lower courts followed fair procedures, a judgment that is a product of that process is entitled to a strong presumption of validity. It also noted that comparisons with other awards of punitive damages are difficult because no two cases are truly identical. *TXO*, 509 U.S. at 456-57, 113 S.Ct. 2711. It quoted the Court's statement in *Haslip* that it is not possible to draw a mathematical bright line between acceptable and unacceptable awards but that a general concern for reasonableness certainly enters into the calculation. *Id.* at 458, 113 S.Ct. 2711.

In evaluating whether the award in *TXO* was grossly excessive, the plurality first rejected the defendant's emphasis on the fact that the award was 526 times the amount of the actual damages that the jury awarded. Although the plurality agreed that punitive damages should bear a reasonable relationship to compensatory damages, it agreed with a previous West Virginia Supreme Court case in which that court pointed out that the ratio between the dollar amounts of compensatory and punitive damages is only one of several factors for evaluating that relationship. Among the other factors that the West Virginia court identified was the relationship between the harm that was likely to occur from the defendant's conduct as well as the harm that actually occurred. *TXO*, 509 U.S. at 459-60, 113 S.Ct. 2711.

The jury could have found in *TXO* that the defendant would have avoided millions of dollars in royalty payments if it had successfully attacked the plaintiff's title. The plurality said that, even if the amount of savings were only $1 million, the award of punitive damages would not jar its sensibilities. *TXO*, 509 U.S. at 461-62, 113 S.Ct. 2711. It reasoned:

> "The punitive damages award in this case is certainly large, but in light of the amount of money potentially at

> stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow."

Id. at 462, 113 S.Ct. 2711 (footnote omitted). In its instructions to the jury, the trial court also authorized it to take into account the defendant's wealth in assessing punitive damages, recognizing that deterrence may require a larger fine for a defendant of larger means than it would for a defendant of ordinary means. The *TXO* plurality recognized that emphasizing the wealth of the wrongdoer increased the risk that the award would be influenced by prejudice against a large corporation, especially one from outside the state. However, it noted that in *Haslip* it had referred to the financial condition of the defendant as a factor in assessing punitive damages. *Id.* at 463-64, 113 S.Ct. 2711.

In his concurrence, Justice Kennedy objected to the plurality's reliance on general reasonableness as the basis for evaluating the constitutionality of the award. He thought that it was more manageable to focus not on the amount of the award but on the jury's reasons for making the award:

> "The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions. Rather, its fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property. When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award."

TXO, 509 U.S. at 467, 113 S.Ct. 2711 (Kennedy, J., concurring). He did not agree with the plurality that a rational rela-

tionship between the size of the award and the harm that the defendant's conduct threatened was an adequate basis for concluding that the award was rational because the record did not indicate that that was the basis on which the case was presented to the jury. He was concerned that the record suggested, as the dissent argued, that the verdict was the result of redistributionist impulses arising from antipathy to a wealthy, out-of-state corporation. Justice Kennedy concluded, however, that the verdict was permissible, primarily because the defendant acted with malice; the evidence of "deliberate, wrongful conduct" was sufficient to show that the jury was motivated by a legitimate concern to punish and deter the defendant. *Id.* at 468-69, 113 S.Ct. 2711 (Kennedy, J., concurring). Justice Kennedy observed:

> "There was ample evidence of willful and malicious conduct by TXO in this case; the jury heard evidence concerning several prior lawsuits filed against TXO accusing it of similar misdeeds; and respondents' attorneys informed the jury of TXO's vast financial resources and argued that TXO would suffer only as a result of a large judgment."

Id. at 469, 113 S.Ct. 2711 (Kennedy, J., concurring).

Justice Scalia, joined by Justice Thomas, concurred on the ground that due process required only that there be fair procedures for making and reviewing an award of punitive damages. Because the West Virginia courts properly instructed the jury and properly reviewed its verdict for reasonableness, he agreed that it should be affirmed.[11] *TXO*, 509 U.S. at 470-72, 113 S.Ct. 2711 (Scalia, J., concurring).

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[11] The Court subsequently followed Justice Scalia's suggestions concerning procedural requirements. In *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994), it held that the Due Process Clause requires post-verdict review of punitive damage awards for excessiveness. In *Cooper Industries,*

In her dissent, Justice O'Connor argued that the record showed that the verdict was based on prejudice against a wealthy outside corporation and constituted a windfall to the plaintiff based on the jury's desire to redistribute that wealth. *TXO*, 509 U.S. at 490-91, 113 S.Ct. 2711 (O'Connor, J., dissenting). She did not argue, however, that consideration of a defendant's wealth is impermissible. Rather, she said that courts simply need to recognize the special dangers involved when they review jury verdicts. *Id.* at 491-92, 113 S.Ct. 2711 (O'Connor, J., dissenting).

TXO was followed by *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (*Gore*), a 5-4 decision. It became the first case in which the Court held that an award of punitive damages was excessive. In *Gore*, the jury awarded Gore, the plaintiff, $4,000 in actual damages and $4 million in punitive damages for BMW's conduct in representing that the car that it sold to him was new despite presale damage that required repainting the car at a cost of $601. BMW had a policy of not telling purchasers about presale repairs that cost less than three percent of the value of the vehicle. Gore produced evidence that the repair reduced the value of his car by $4,000, which was ten percent of its cost as new. He also produced evidence that between 1983 and the time of trial, the defendant had sold 983 cars, including 14 in Alabama, representing them to be new cars without disclosing that they had been repainted at a cost of more than $300 per vehicle. Gore calculated his request for punitive damages of $4 million by multiplying his $4,000 actual damages by the approximately 1,000 cars that

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Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), it required appellate courts to determine whether an award of punitive damage is excessive without giving any deference to the trial court's decision on that issue. Our review of the award in this case is consistent with those procedural decisions.

the defendant had sold. *Gore*, 517 U.S. at 563-65, 116 S.Ct. 1589.

On appeal, the Alabama Supreme Court applied the criteria that the United States Supreme Court had approved in *Haslip* and held that the award was not excessive. However, the Alabama court concluded that the jury improperly included BMW's conduct in other jurisdictions in calculating the amount of punitive damages. It therefore reduced the amount of those damages to $2 million. The court based its conclusion on a belief that that amount was a constitutionally reasonable amount based on its comparative analysis both of other Alabama cases and of cases from other jurisdictions that involved a seller's misrepresentation of the condition of an automobile. *Gore*, 517 U.S. at 566-67, 116 S.Ct. 1589.

The United State Supreme Court first agreed with the Alabama court that the state had no authority to penalize a defendant for conduct in other jurisdictions that was legal where it occurred and that had no effect on Alabama residents. *Gore*, 517 U.S. at 568-73, 116 S.Ct. 1589. It did recognize, however, that evidence of out-of-state conduct may be relevant for determining the reprehensibility of a defendant's conduct. *Id.* at 574 n. 21, 116 S.Ct. 1589. The Court then concluded that the punitive damages award, even with the Alabama court's reductions, was grossly excessive. The Court's focus in evaluating the award was on whether the defendant received fair notice, not only of the conduct that could subject it to punishment but also of the severity of the penalty. *Id.* at 574, 116 S.Ct. 1589. It relied on three guideposts for deciding that issue:

> "[T]he degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases."

Id. at 575, 116 S.Ct. 1589.

According to the *Gore* Court, the reprehensibility of the defendant's conduct is the most important indication of the reasonableness of an award of punitive damages; some wrongs are more blameworthy than others. Trickery and deceit or repeated misconduct, for example, are more reprehensible than mere negligence. *Gore*, 517 U.S. at 575-76, 116 S.Ct. 1589. In *Gore*, however, none of the factors associated with particularly reprehensible conduct was present. The harm that BMW inflicted was purely economic in nature. Although Gore argued that BMW's actions were part of a nationwide pattern of tortious conduct, the Court concluded that there was no reason for BMW to know that its actions violated applicable statutes or common-law rules in other states. In addition, there was no evidence that BMW had acted in bad faith when it predetermined the amount of repairs to a new car that, in its view, required disclosure before sale. Also, there was no evidence that it had made deliberate false statements, committed affirmative misconduct, or had concealed evidence of an improper motive. Thus, the Court concluded that no circumstances existed that are ordinarily associated with egregiously improper conduct. *Id.* at 576-80, 116 S.Ct. 1589.

Although it said that reprehensibility is the most important factor in assessing of the reasonableness of an award, the Court commented that the second guidepost, the ratio between the award and the actual harm inflicted on the plaintiff, is probably the most often cited. It noted that early English statutes often provided for double, treble, or quadruple damages for particular wrongs and that, in *Haslip*, it had suggested that an award that was more than four times the compensatory damages might be close to a constitutional violation. It then pointed out that the plurality in *TXO* had refined the issue by holding that the proper inquiry is the ratio between the punitive damages award and the harm likely to

result from the defendant's conduct, not simply the harm that had occurred.[12] *Gore*, 517 U.S. at 580-81, 116 S.Ct. 1589.

In contrast to prior cases, the $2 million award in *Gore* was 500 times the amount of Gore's actual harm, and there was no indication that he was threatened with any additional potential harm. Assuming that the other 13 Alabama consumers suffered the same loss, the award was 35 times the total loss suffered by Alabama consumers. However, the Court rejected the idea that the constitutional line is marked by a simple mathematical formula, even one that compared actual and potential damages with the punitive award. For example, low awards of compensatory damages might support a higher ratio than high compensatory awards, particularly when a particularly egregious act resulted in relatively low economic damages or when injury is hard to detect or the monetary value of noneconomic harm is difficult to determine. *Gore*, 517 U.S. at 582-83, 116 S.Ct. 1589. Nevertheless, a ratio of 500 to 1 at least raised "a suspicious judicial eyebrow" for the Court. *Id.* at 583, 116 S.Ct. 1589 (citation omitted).

The third guidepost for determining excessiveness involves comparing the award of punitive damages to the civil or criminal penalties that are available for the defendant's conduct. The purpose of this guidepost is to allow the reviewing court to give substantial deference to the legislative judgment about appropriate sanctions. The $2 million award in *Gore* was substantially greater than fines in Alabama or elsewhere for similar misconduct. None of those sanctions gave BMW notice that the first violation—or even the first 14 violations—could lead to a multimillion dollar penalty. There was also no reason to assume that a penalty of that size was necessary in order to motivate the defendant to change

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[12] The Court treated that portion of the plurality opinion in *TXO* as stating the holding of the Court.

its policy, as it did after the verdict in this case. The Court assumed that the undisclosed damage and repainting affected the value of Gore's car and of the 13 other similar BMWs in Alabama and that those cars would lose their attractive appearance more rapidly than other BMWs, but it was not willing to accept the Alabama court's conclusion that BMW's conduct was sufficiently egregious to justify a punitive sanction that was equivalent to a severe criminal penalty. Moreover, the fact that BMW was a large corporation did not diminish its entitlement to fair notice of the demands that the several states imposed on it; indeed, its status implicated the federal interest in preventing undue burdens on interstate commerce. *Gore*, 517 U.S. at 583-85, 116 S.Ct. 1589.

Justice Breyer, along with two of the other justices who joined the majority opinion in *Gore*, concurred. He emphasized the need for proper standards for reviewing an award of punitive damages and concluded that the standards that the Alabama court had applied were so vague and open ended as to risk arbitrary results. In his view, those standards provided no basis for distinguishing between conduct that warrants a small award and conduct that would justify a very large award, and he thought that the Alabama courts had applied them in ways that did not in fact limit the amounts awarded. *Gore*, 517 U.S. at 586-89, 116 S.Ct. 1589 (Breyer, J., concurring). He also believed that BMW's financial status was offered into evidence simply to provide an open-ended basis for inflating an award against a wealthy defendant. Although the use of that factor was not unlawful or inappropriate *per se*, he said that it could not make up for the failure of other factors, such as reprehensibility, to constrain an award. *Id.* at 591, 116 S.Ct. 1589 (Breyer, J., concurring). He faulted the Alabama courts for not applying any economic theory in evaluating the award and explained that the award, in his view, did not exemplify any community understanding or historic practice. *Id.* at 592-94, 116 S.Ct. 1589 (Breyer, J., concurring). Because Alabama's legal standards offered vir-

tually no constraint on jury awards, and because of the severe disproportion between the award and legitimate objectives for punitive damages, Justice Breyer agreed both with the Court's decision to scrutinize the award and with its conclusion that the award was grossly excessive and therefore unconstitutional. *Id.* at 596-97, 116 S.Ct. 1589 (Breyer, J., concurring).

Gore provided the framework for our initial opinion in this case. Our opinion followed the Oregon Supreme Court's holding in *Parrott*. In that case, the court applied the above-mentioned cases to a claim made under the Unlawful Trade Practices Act (UTPA), which expressly authorizes punitive damages for a violation of the statute. ORS 646.608(1)(e), (g), (t); ORS 646.638(1). The defendant, Carr Chevrolet, had been found to have knowingly misrepresented the status of the title and a number of other aspects of a vehicle that it had sold to the plaintiff. According to the evidence, those actions were part of Carr's normal business practices. The jury awarded the plaintiff compensatory damages of $11,496 and punitive damages of $1 million. The trial court reduced the punitive damages award to $50,000; on appeal, this court partially restored the award to $300,000. *Parrott v. Carr Chevrolet, Inc.*, 156 Or.App. 257, 965 P.2d 440 (1998). The Oregon Supreme Court, after evaluating the Gore guideposts together with the "rational juror" criteria that the court had previously identified in *Oberg v. Honda Motor Co.*, 320 Or. 544, 888 P.2d 8 (1995), *cert. den.*, 517 U.S. 1219, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996), reinstated the jury's verdict in its entirety. It emphasized that, at least for the purposes of *Parrott*, both the *Gore* criteria and the rational juror standard were based entirely on federal law; at least before the adoption in 1995 of *former* ORS 18.537(2) (1995), *renumbered as*

ORS 31.730(2)(2003),[13] there was no basis in Oregon law for challenging an award of punitive damages if there was any evidence to support an award. *See Parrott*, 331 Or. at 551-65, 17 P.3d 473.

Applying its understanding of *Gore*, the Oregon Supreme Court identified in *Parrott* five criteria for determining the range of punitive damages that a rational juror would be entitled to award: (1) the statutory and common-law facts that allow an award for the claim at issue; (2) the state interests that the award would serve; (3) the degree of reprehensibility of the defendant's conduct; (4) the disparity between the award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for similar misconduct. The latter three criteria are the *Gore* guideposts. The second criterion also came from *Gore*, while the first criterion came from the court's previous discussion in *Oberg*. *Parrott*, 331 Or. at 555, 17 P.3d 473. After examining the facts in *Parrott*, the court stated that the case presented an extremely egregious violation of the UTPA. It held that punishing the defendant for misconduct in Oregon and deterring it from additional such conduct furthered a significant state interest. In its view, the defendant's misconduct was far more serious than that of the defendant in *Gore*, in part because it involved intentional affirmative misrepresentations of material facts and, in part, because the defendant's conduct was part of its ordinary business practices. *Id.* at 560-62, 116 S.Ct. 1589.

The *Parrott* court then turned to the relationship between the actual or potential harm and the punitive damages award. It noted that analyzing that relationship required a consideration of the harm that was likely to result, as well as the harm that actually resulted. Because the defendant's conduct was a

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[13] *Former* ORS 18.537 codified the "rational juror" standard that the Oregon court described in *Oberg*, making it part of state law. It became effective after the events at issue in *Parrott*.

routine part of its business practices, the court considered the potential injury that those practices caused to past, present, and future customers. In that light, the 87-to-1 ratio between the punitive and compensatory damages did not raise any constitutional concerns. *Parrott*, 331 Or. at 562-63, 17 P.3d 473. Finally, the court noted that the civil penalties for Carr's conduct could include injunctive relief and the loss of its business license. Those penalties could have potentially serious economic consequences for Carr. *Id.* at 563-64, 17 P.3d 473. For all of those reasons, the court reinstated the full amount of the punitive damages award. In turn, in light of *Parrott*, we reinstated the jury's award of punitive damages in this case. *Williams*, 182 Or.App. at 70-74, 48 P.3d 824. With that background, we turn to the Court's decision in *State Farm*, which was decided after the Oregon Supreme Court ruled in *Parrott* and which has prompted the remand of this case to us.

Curtis Campbell, one of the plaintiffs in *State Farm*, negligently caused an automobile accident that resulted in the death of another driver and the permanent disability of a third driver. The injured driver and the deceased driver's estate sued Campbell. State Farm Mutual Insurance Company (State Farm) was Campbell's liability insurer; its policy limits were $25,000 per claimant, for a total of $50,000. Although investigators and witnesses reached a consensus that Campbell's negligence was the cause of the accident, State Farm decided to contest liability and refused offers from the injured parties to settle for the policy limits. Before trial, it assured Campbell and his wife that they had no reason to be concerned and that it would represent their interests. After the jury returned a verdict for $185,849, State Farm told them to put "for sale" signs on their house and refused to post a supersedeas bond in order for Campbell to appeal the judgment. Campbell managed to appeal on his own, and State Farm paid the judgment after the appellate court affirmed it. During the course of the appeal, Campbell and his wife

reached an agreement with the injured parties under which the injured parties agreed not to seek satisfaction of their claims from the Campbells personally and under which the Campbells agreed to pursue a bad faith action against State Farm. *State Farm*, 538 U.S. at 412-14, 123 S.Ct. 1513.

The Campbells filed an action against State Farm. The trial court held a bifurcated trial. At the end of the first portion of the trial, the jury found that State Farm's decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict. During the second part of the trial, the Campbells introduced evidence that State Farm's response to the claims against them was the result of a national program ("Performance, Planning and Review," or "PP & R") designed to cap payments on claims throughout the company. The evidence offered related to State Farm's business practices over a 20 year period in numerous states; most of it had no relationship to third-party insurance claims. State Farm countered with evidence that its decision to take the case to trial was simply an honest mistake. However, the jury awarded compensatory damages of $2.6 million and punitive damages of $145 million to the Campbells. The trial court reduced the awards to $1 million in compensatory damages and $25 million in punitive damages. On appeal, the Utah Supreme Court, applying the *Gore* guideposts, reinstated the original punitive damages award. In evaluating the reprehensibility of State Farm's conduct, it emphasized the evidence concerning the PP & R policy. The court also relied on State Farm's massive wealth and reasoned that, because of the clandestine nature of State Farm's conduct, the chance of punishment in any specific case was extremely small. *State Farm*, 538 U.S. at 414-16, 123 S.Ct. 1513.

In reviewing the Utah court's decision, the United States Supreme Court first restated its concerns about excessive punitive damages. It observed that the primary danger in such awards is their potential to deprive a person of property arbitrarily without fair notice and without furthering any legiti-

mate purpose of punishment or deterrence. It stated that an award that is grossly excessive furthers no legitimate purpose and constitutes an arbitrary deprivation of property. The Court said that defendants subject to civil punitive damages do not have the same protections as defendants in a criminal case; among other things, jury instructions typically are vague and leave juries with broad discretion in choosing the amount to award, and evidence of a defendant's net worth creates the potential for bias against large businesses. Such concerns, according to the Court, increase when the decision-maker is presented with evidence that has little bearing on the amount that it should award. Based on those concerns, the Court proceeded to apply *Gore* guideposts to the case before it. *State Farm*, 538 U.S. at 416-18, 123 S.Ct. 1513.

With regard to the reprehensibility of State Farm's conduct, the Court summarized the factors that it had previously identified in *Gore* as whether

> "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

State Farm, 538 U.S. at 419, 123 S.Ct. 1513 (citation omitted). The Court agreed that State Farm's conduct toward the Campbells did not merit any praise. In fact, State Farm employees had altered the company's records to make Campbell appear less culpable in the underlying accident, the company had disregarded the overwhelming likelihood both of liability and of a verdict in excess of the policy limits, and, although it had first assured the Campbells that their assets would be safe, after the verdict it had told them to sell their house. Thus, State Farm's conduct was reprehensible enough to

support an award of punitive damages in some amount. *Id.* at 419-20, 123 S.Ct. 1513.

The problem, however, in the case, according to the Court, was that the Campbells and the Utah courts had used State Farm's conduct in that case as a platform to expose and punish perceived deficiencies in State Farm's operations throughout the country concerning matters that had no relationship to its conduct in regard to the Campbells. In reinstating the jury's award, the Utah Supreme Court had emphasized evidence that the way that State Farm had treated the Campbells was simply one application of its nationwide PP & R policy. In doing so, according to the Court, the Utah court had improperly relied on evidence of dissimilar acts and of acts that were lawful in the states in which they occurred. The Court said that a state generally does not have a legitimate interest in punishing even unlawful acts committed outside of the state's jurisdiction. *State Farm*, 538 U.S. at 420-22, 123 S.Ct. 1513. It explained:

> "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."

Id. at 422, 123 S.Ct. 1513 (citation omitted). That does not mean, the Court continued, that lawful out-of-state conduct is always irrelevant. Indeed, such "conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." *Id.*

In the Court's view, the Campbells demonstrated little evidence of repeated misconduct by State Farm of the kind that injured them. *State Farm*, 538 U.S. at 423, 123 S.Ct. 1513. The Court concluded that, "because the Campbells

have shown no conduct by State Farm similar to that which harmed them," the only relevant conduct was State Farm's treatment of the Campbells themselves. *Id.* at 424, 123 S.Ct. 1513. The limited evidence of State Farm's conduct that the jury could properly consider made that conduct far less reprehensible than the Utah court had believed it to be.

The Court turned next to the second *Gore* guidepost, the relationship between State Farm's conduct and the size of the award. It observed that the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* at 425, 123 S.Ct. 1513. The Court did not reject the 145-to-1 ratio between the Campbells's compensatory damages and the award of punitive damages out of hand. Rather, it stated that the ratio gave rise to a presumption of constitutional invalidity and that the other considerations that it had identified did not overcome that presumption. It considered the fact that the Campbells had received $1 million as full compensation for a year and a half of emotional distress. Also, because State Farm paid the excess verdict before the Campbells filed their bad faith action, they had suffered only minor economic injuries. Their emotional harm thus arose from an economic transaction, not from a physical assault or trauma, and they had suffered no physical injuries. Moreover, in the Court's view, the compensatory and punitive damages partially overlapped because the compensatory damages included compensation for the emotional distress that State Farm had caused, a factor that the Court believed was also a basis for the punitive damage award. Although the Utah court had stated that State Farm's policies had affected many other Utah consumers, the Campbells were unable to point to evidence in the record demonstrating harm to anyone other than those involved in the case. Finally, the Court observed that State Farm's great wealth did not support an otherwise unconstitutional award, in part because the purpose of much of that wealth was to enable State Farm to pay the claims of its poli-

cyholders and in part because wealth by itself cannot make up for the failure to satisfy other guideposts, such as reprehensibility, to justify an award. *Id.* at 426-28, 123 S.Ct. 1513.

With regard to the third *Gore* guidepost, the disparity between the punitive damages award and potentially applicable civil penalties, the Court modified its previous reliance on criminal penalties, suggesting that, although the existence of a criminal penalty bears on the seriousness with which the state views wrongful conduct, it is less useful in evaluating the amount of a punitive damages award. A state can impose criminal penalties only after providing the protections that the criminal process entails; the remote possibility of a criminal sanction does not automatically sustain a punitive damages award. In any event, the only relevant Utah statutory penalty appeared to be a $10,000 fine for an act of fraud, an amount dwarfed by the punitive award of $145 million. The Court concluded that the evidence would sustain a punitive award only at or near the amount of compensatory damages, but it left the precise amount for the Utah courts to resolve in the first instance. *State Farm*, 538 U.S. at 428-29, 123 S.Ct. 1513.

We have previously applied *State Farm* to two cases involving punitive damages, each on remand from the United States Supreme Court. *Bocci v. Key Pharmaceuticals, Inc.*, 189 Or.App. 349, 76 P.3d 669, *modified on recons.*, 190 Or.App. 407, 79 P.3d 908 (2003); *Waddill v. Anchor Hocking, Inc.*, 190 Or.App. 172, 78 P.3d 570 (2003). In *Bocci*, the plaintiff Bocci took a prescription drug for asthma that the defendant Key Pharmaceuticals (Key) promoted as a safe product. He then took an antibiotic for a skin rash without telling the prescribing physician about his consumption of the asthma drug. When he began experiencing what proved to be toxicity from the asthma drug, he saw Edwards, a physician, for diagnosis and treatment. Because Key had promoted the asthma drug as safe, Edwards did not recognize

Bocci's symptoms as toxicity to that drug. As a result, Edwards simply sent Bocci home; soon afterwards Bocci began experiencing seizures and ultimately suffered serious permanent injuries. He sued both Key and Edwards, and Edwards filed a cross-claim against Key. The jury awarded Bocci significant compensatory and punitive damages and awarded Edwards compensatory damages of $500,000 and punitive damages of $22.5 million. The jury expressly found that Key was negligent with respect to Edwards, that it had made fraudulent misrepresentations to him, that it had knowingly withheld or misrepresented information concerning the drug's toxicity to the Food and Drug Administration or prescribing physicians, and that it had acted with wanton disregard for the safety of others. 189 Or.App. at 352-53, 76 P.3d 669.

When we first considered the award of punitive damages in *Bocci*, before the decision in *State Farm*, we applied *Parrott* and affirmed the award. *Bocci v. Key Pharmaceuticals, Inc.*, 178 Or.App. 42, 35 P.3d 1106 (2001). On remand from the Court after its decision in *State Farm*, we reevaluated the jury's award in light of the *Gore* guideposts as the Court had refined them in that case. We began with the first guidepost, the reprehensibility of Key's conduct, and considered the various factors that the Court had identified in *State Farm*. We rejected Key's argument that we should ignore evidence that did not directly relate to Edwards's claim. Unlike in *State Farm*, where the evidence of other harm involved dissimilar acts that bore no relation to the harm that the Campbells suffered, Key's actions toward Bocci were the same acts that caused harm to Edwards. In addition, we rejected Key's argument that we should ignore the evidence of its out-of-state promotional activities. Although the Court in *State Farm* had rejected the Campbells' evidence of State Farm's unrelated misconduct, it also had recognized the relevance of repeated out-of-state misconduct of the same sort that injured the plaintiff. We concluded that it was appropri-

ate for the jury to consider evidence that Key had engaged in a nationwide dissemination of false and misleading information and that that conduct had led to Bocci's and Edwards's damages. *Bocci*, 189 Or.App. at 356-58, 76 P.3d 669.

The harm that resulted from Key's conduct was physical and economic harm to Bocci as well, and Key's actions demonstrated an indifference to or reckless disregard of the health and safety of others. Neither party addressed the factor of the victim's financial vulnerability, but it was clear that Key's actions were repeated as opposed to isolated incidents of misconduct. In addition, Key knowingly withheld or misrepresented information concerning the toxicity and safety of the drug. Thus, there was evidence of four of the five factors for determining reprehensibility that the Court had applied in *State Farm*. *Bocci*, 189 Or.App. at 358-59, 76 P.3d 669.

We next discussed the relationship between the harm or potential harm to the plaintiff and the punitive damages award. We recognized that the Court had suggested that the ratio between compensatory and punitive damages should ordinarily be in single digits and that a ratio greater than 4 to 1 might be questionable. The ratio of the punitive damage award to the award of compensatory damages in *Bocci* exceeded single digits, which raised questions about the award. Although we held that Key's conduct did not rise to the level of " 'particularly egregious,' intentionally malicious acts that would justify a ratio in excess of single digits," it was sufficiently malicious that it justified a ratio greater than 4 to 1. *Bocci*, 189 Or.App. at 359-61, 76 P.3d 669. We ultimately concluded that a ratio of 7 to 1, or an award of $3.5 million, was constitutionally permissible.[14]

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[14] There was no relevant evidence on the third guidepost, the relationship between the award and any civil penalties authorized in similar cases. *Bocci*, 189 Or.App. at 361, 76 P.3d 669.

Waddill was a personal injury case in which the plaintiff was severely injured when a glass fishbowl shattered while she was carrying it filled with water. Although Anchor Hocking, the defendant manufacturer, had learned of similar incidents, it had not retained records of them and had failed to use those incidents to improve the safety of its product. It had not even added a simple warning of the dangers of carrying a fish bowl with water in it. The jury awarded Waddill compensatory damages of $132,472 (which the court reduced to $100,854 to reflect the jury's finding that the plaintiff was 25 percent at fault) and punitive damages of $1 million. *Waddill*, 190 Or.App. at 178-79, 78 P.3d 570. We originally affirmed, *Waddill v. Anchor Hocking, Inc.*, 175 Or.App. 294, 27 P.3d 1092 (2001), *rev. den.*, 334 Or. 260, 47 P.3d 486 (2002), but the Court vacated our decision and remanded for reconsideration in light of *State Farm*.

On remand, we concluded that Anchor Hocking was indifferent to or recklessly disregarded the health and safety of its customers. However, the evidence of repeated conduct was weak, and there was no evidence that Anchor Hocking had acted with intentional malice or had engaged in fraudulent conduct or deceit. We concluded that Anchor Hocking's actions were sufficiently egregious to justify an award of punitive damages, but they were not as egregious as those of the defendant in *Bocci*. Because the Court indicated in *State Farm* that a ratio of 4 to 1 was close to the constitutional ceiling, and because there was nothing unusual about the facts of *Waddill*, we concluded that the maximum permissible award in *Waddill* was four times the harm that Anchor Hocking caused and reduced the punitive damages award accordingly. *Waddill*, 190 Or.App. at 182-83, 78 P.3d 570.

We turn now to the parties' argument in this case after remand by the Court. Defendant first argues that it is now clear, as a result of the Court's discussion in *State Farm*, that we erred in our previous decision when we rejected its as-

signment of error concerning the trial court's failure to instruct the jury that, among other things,

> "[t]he size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit."

(Internal quotations omitted.) Defendant states that the instruction "perfectly predicted the Supreme Court's holdings in *State Farm*." In support of its argument, it quotes the Court's statements that

> "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis"

and that punishment on the basis of harm to nonparties

> "creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."

538 U.S. at 423, 123 S.Ct. 1513.

We briefly considered this aspect of *State Farm* in *Bocci*, in which Key argued, based on the first statement that defendant quotes, that we should not consider the harm to Bocci in evaluating the punitive damages awarded to Edwards. In response, we noted that the Court had made that statement in the context of discussing the Utah Supreme Court's reliance on what the Court described as State Farm's dissimilar acts,

which, according to the Court, bore no relationship to the harm that the Campbells suffered. In *Bocci*, in contrast, there was nothing hypothetical about Bocci's claim or about the harm that Key caused him; the harm to Edwards was the result of the same acts that had caused harm to *Bocci*. We therefore rejected that argument in that case. *Bocci*, 189 Or.App. at 357-58, 76 P.3d 669.

In this case, there is evidence concerning other Oregon victims of defendant's decades-long fraudulent scheme. The tobacco industry and defendant directed the same conduct toward thousands of smokers in Oregon. They all received the same representations, from the same entities, and through the same media, and the industry intended to induce Oregon smokers to act on those representations in the same way. That conduct was a fundamental part of defendant's business strategy; Williams was simply one of its many Oregon victims. In that sense, this case is more like *Gore* than like *State Farm*. In *Gore*, there was evidence of BMW's identical misconduct toward 13 other people in Alabama that the Court considered relevant. Under the facts of this case, the evidence of injury to others is not an attempt to blacken defendant's reputation in general, but, rather, it describes the consequences to other Oregonians resulting from the very actions that harmed plaintiff. Thus, we are not persuaded by defendant's argument that we erred in our previous decision when we rejected its argument that the trial court erred by failing to instruct the jury that it could not punish defendant for the impact of its misconduct on others.

In addition, as we noted in our original opinion, ORS 30.925(2)(g) requires a jury to consider evidence of punishments already imposed on the defendant when it considers the amount of an award of punitive damages. As a result, the Court's concern in *State Farm* about multiple punitive damages awards that would be excessive in total is ameliorated by Oregon law. By introducing evidence of this award in future cases, defendant can ensure that both juries and courts

will adjust any future award to account for this one. Contrary to the usual situations on which the Court based its statement, the judgment in this case will protect defendant from an excessive judgment in a future case, even if it may not be legally binding on future parties. For both of those reasons, we believe that the holding in *State Farm* does not affect our previous conclusion that "the potential injury to past, present, and future consumers as the result of a routine business practice is an appropriate consideration in determining the amount of punitive damages." *Williams*, 182 Or.App. at 64, 48 P.3d 824.[15]

We now turn to the primary issue before us, whether the jury's award is consistent with the *Gore* guideposts as the Court refined them in *State Farm*. As an initial matter, in general, the State of Oregon has a legitimate interest in punishing defendant and deterring it from further misconduct. *See Gore*, 517 U.S. at 568-69, 116 S.Ct. 1589 (discussing the state's interest regarding punitive damage awards).[16] In *Gore*, those interests were limited by, among other things, the nature of the harm (economic) and the diversity of state approaches to dealing with deceptive trade practices. In this case, the state's interests are at their maximum; they involve the protection of the health and lives of its citizens. *See Williams*, 182 Or.App. at 68-69, 48 P.3d 824. Defendant does not suggest that there is any diversity among states concerning the importance of that kind of interest.

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[15] As plaintiff points out, defendant's proposed instruction is also confusing, and the trial court could properly have refused to give it for that reason. The instruction would have informed the jury both that it *may* consider the harm to others in determining the reasonable relationship of its award to the harm caused to Williams and that it *may not* punish defendant for the impact of its misconduct on others.

[16] *See also* ORS 31.735 (providing for the distribution of punitive damages between prevailing parties and the State of Oregon).

The first *Gore* guidepost concerns the reprehensibility of defendant's conduct. In our view, this case involves conduct that is more reprehensible than that in any of the cases that we have discussed. As we have said, the jury could have found the following facts from the evidence before it. Defendant sold a product that it knew would cause death or serious injury to its customers when they used it as defendant intended them to use it. Despite that knowledge, defendant, together with the rest of the tobacco industry, engaged in an extensive campaign to convince smokers that the issue of cigarette safety was unresolved. It insisted that more research was necessary at the very time that it was carefully avoiding doing the very research for which it called, although it had an extensive program of research into other issues. Rather, it used its research to determine the optimum dose of nicotine in each cigarette, knowing of, but publicly denying, nicotine's highly addictive properties. Defendant also knew that, because of those addictive properties, it would be difficult for smokers to quit smoking, and it relied on its fraudulent message to discourage them from doing so. The result, as defendant hoped, was that addicted smokers remained addicted and purchased more of its product. In short, defendant used fraudulent means to continue a highly profitable business knowing that, as a result, it would cause death and injury to large numbers of Oregonians.

We held in *Bocci* that Key's conduct of disseminating false and misleading information about its drug throughout the nation was especially reprehensible and justified a greater award. Key's drug was, however, potentially useful in the treatment of a serious disease, and there was no evidence that Key routinely engaged in that misconduct with regard to its products. In comparison, defendant's actions in this case are far more egregious than Key's actions in *Bocci*, considering the length of time over which the conduct occurred, the number of business entities involved, the express intention to mislead consumers, the number of people harmed, and in al-

most every other aspect of what defendant did. That difference in magnitude of harm places this case in a different class from the cases that we have described. Here, the harm caused was physical rather than economic and, for Williams, the most serious physical harm possible, his death. Defendant's conduct not only shows a reckless disregard of the safety of others but conduct with knowledge that others would be harmed by its actions. Moreover, defendant's fraud was motivated by economic considerations. In other words, the jury could have found that defendant misrepresented the safety of its product for its own pecuniary gain, gain that it would not otherwise have achieved but for the misrepresentation. There is no evidence concerning the third factor, whether Williams was financially vulnerable. The fourth factor is whether the conduct involved repeated actions or was simply an isolated incident. Not only did defendant's conduct involve repeated actions, those actions were directed at Oregon citizens over a period of 40 years. The fifth factor is whether the harm was the result of intentional malice, trickery, or deceit or simply an accident. Here, defendant intentionally misled the Oregon public regarding the results of its research and increased the nicotine in its products to make them more addictive and more dangerous. Thus, in our view, four of the five *Gore* factors exist in this case.[17]

The second *Gore* guidepost is "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award [.]" *State Farm*, 538 U.S. at 418, 123

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[17] Defendant argues that Oregon cannot punish it for conduct that was lawful where it occurred or for selling a lawful product. First, all of the out-of-state conduct that we discuss led to actions within Oregon or that were directed to Oregonians; Oregon has the authority to punish defendant for such conduct. Second, the punitive damages award was based not simply on defendant's selling cigarettes but on its using fraudulent and deceptive means in order to do so.

S.Ct. 1513. For purposes of guidance, we quote extensively from the Court's opinion in *State Farm*:

> "Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. 517 U.S. at 582, 116 S.Ct. 1589 ('[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award'); *TXO*, *supra*, at 458, 113 S.Ct. 2711. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S. at 23-24, 111 S.Ct. 1032. We cited that 4-to-1 ratio again in *Gore*, 517 U.S. at 581, 116 S.Ct. 1589. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. *Id.* at 581, and n. 33, 116 S.Ct. 1589. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, *id.*, at 582, 116 S.Ct. 1589 or, in this case, of 145 to 1.
>
> "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has re-

> sulted in only a small amount of economic damages.' *Ibid.*; see also *ibid.* (positing that a higher ratio *might* be necessary where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine'). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.
>
> "In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."

Id. at 424-26, 123 S.Ct. 1513 (emphasis and brackets in original).

There is no doubt that, under the holding in *State Farm*, there is a presumption of constitutional invalidity arising from the jury's award of punitive damages in this case, if there is, in fact, a 96-to-1 ratio between the compensatory and punitive damages awarded to plaintiff. We are mindful that the Court said in *State Farm* that "few awards exceeding a single-digit ratio * * * will satisfy due process" and that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425, 123 S.Ct. 1513 (citation omitted). We first inquire therefore as to what is the correct amount of compensatory damages to consider for purposes of computing the ratio under the second guidepost in *Gore*. In answering that question, we are guided by the Court's decisions in *TXO* and *Gore*.

In *TXO*, the plurality writing for the Court took into consideration the respondents' actual damages and the potential

damage that could have been caused by its conduct, had TXO's fraudulent scheme succeeded:

> "It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."

509 U.S. at 460, 113 S.Ct. 2711 (emphasis in original). The Court calculated the potential harm of TXO's conduct to be more than 50 times the $19,000 in actual damages that the respondents suffered. *Id.* at 459-62, 113 S.Ct. 2711 (plurality opinion). In *Gore*, the plaintiff introduced evidence that BMW had sold 14 cars in the State of Alabama without disclosing that the cars had been repainted. The Court recognized that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Gore*, 517 U.S. at 568, 116 S.Ct. 1589. Court explained that, to avoid encroachment on policy choices of other states, the economic penalties that a state inflicts must be supported by the state's interest in protecting its own consumers. Thus, the Court analyzed the reasonableness of the award of punitive damages in *Gore* based on the interests of Alabama consumers rather than those of the entire nation. *Id.* at 572-73, 116 S.Ct. 1589.

We apply those principles to the facts in this case. First, there is the harm to Williams found by the jury to amount to $21,485 in economic damages and $800,000 in noneconomic damages. Second, defendant inflicted potential harm on the members of the public in Oregon through its fraudulent promotional scheme. As we said in our previous opinion,

> "The jury could find on this record that defendant's public relations campaign had precisely the effect that defendant intended it to have and that it affected large numbers of tobacco consumers in Oregon other than Williams. It

> is also reasonably inferable from the evidence that defendant's products, used as defendant intended them to be used, caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but nonfatal health problems with their attendant economic consequences."

Williams, 182 Or.App. at 67, 48 P.3d 824. As the Court did in *TXO*, the jury in assessing the amount of punitive damages was entitled to draw reasonable inferences as to the number of smokers in Oregon who had been defrauded during the past decades and would be affected in the future by defendant's conduct, if that conduct were not deterred. Based on the evidence before it, and, particularly, the pervasiveness of defendant's advertising scheme in Oregon, it would have been reasonable for the jury to infer that at least 100 members of the Oregon public had been misled by defendant's advertising scheme over a 40-year period in the same way that Williams had been misled. Such a conservative calculation of compensatory damages based on William's actual damages and the potential magnitude of damage to the public thus would cause the ratio between compensatory and punitive damages, whatever it is, to fall within *State Farm's* 4-to-1 boundary.

But even if the $79 million award is deemed to exceed a single-digit ratio, it is difficult to conceive of more reprehensible misconduct for a longer duration of time on the part of a supplier of consumer products to the Oregon public than what occurred in this case. We think that the reprehensibility of defendant's conduct far exceeds that of *TXO* where the Court upheld a 10-to-1 ratio, or in *Bocci*, where we upheld a 7-to-1 ratio. Here, in contrast to those cases, the number of potentially defrauded and injured victims is much greater. As the *State Farm* Court stated in the above-quoted language, there are no bright-line ratios or rigid benchmarks that a punitive damage award cannot exceed. We think the unique facts in this case, when compared to the circumstances con-

sidered by the Supreme Court and this court in other cases, would justify more than a single-digit award under the Due Process Clause.

The final *Gore* guidepost examines any disparity between the punitive damages award and other penalties that the state provides for the same conduct. In our previous opinion, we noted that Oregon does not provide civil sanctions for defendant's conduct and that the criminal statutes that plaintiff mentioned were not truly comparable. *Williams*, 182 Or.App. at 72, 48 P.3d 824. Thus, this guidepost does not play a significant role in our analysis, and to the extent that the purpose of the guidepost is to give defendants notice that they may be held liable for punitive damages, ORS 30.925(2) fulfills that function.

Finally, we consider the subject of defendant's wealth and the profitability of its conduct. Although the Court in *State Farm* was concerned that the use of the factor of a defendant's wealth could lead a jury to act to redistribute wealth from a wealthy corporation to an impoverished plaintiff, the wealth of a defendant continues to be an appropriate consideration. *State Farm*, 538 U.S. at 427-28, 123 S.Ct. 1513. In this case, the evidence was that, at the time of trial, defendant's net worth was over $17 billion and defendant's profit for the most recent year for which figures were available was $1.6 billion. *Williams*, 182 Or.App. at 67, 48 P.3d 824. That evidence could be properly considered by the jury in two ways. First, the jury could have found that a large award was necessary in order to punish defendant adequately because it would treat a small award as no more than an insignificant nuisance and part of the cost of doing business. Second, the jury could have found on the evidence before it that a large award would require defendant to disgorge some of the profit that it gained over a number of decades by its misconduct directed at decedent and other Oregonians. In that light, the evidence of defendant's wealth and profits both

supports the award of punitive damages and provides a proper basis for consideration by the jury.

Based on the above analysis, we conclude that an award of punitive damages in the amount of $79.5 million does not violate the Due Process Clause under the guidelines provided by *State Farm* because the amount of the award is reasonable and proportionate to the wrong inflicted on decedent and the public of this state. It follows, that, after reconsidering our previous opinion in light of *State Farm*, we believe that our original decision was correct. We therefore again reinstate the award of punitive damages as originally found by the jury.

On appeal, reversed and remanded with instructions to enter judgment on jury verdict; affirmed on cross-appeal.

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No. 05-1256

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF IN OPPOSITION

JAMES S. COON
RAYMOND F. THOMAS
SWANSON THOMAS & COON
621 SW Morrison Street
Suite 900
Portland, OR 97205
(503) 228-5222

WILLIAM A. GAYLORD
GAYLORD EYERMAN
BRADLEY, P.C.
1400 SW Montgomery St.
Portland, OR 97201
(503) 222-352

ROBERT S. PECK*
CENTER FOR CONSTITUTIONAL
LITIGATION, P.C.
1050 31st Street, N.W.
Washington, DC 20007
(202) 944-2803

CHARLES S. TAUMAN
BENNETT HARTMAN MORRIS
& KAPLAN
P.O. Box 19631
Portland, OR 97280
(503) 849-9821

*Counsel of Record Additional counsel on inside cover

MAUREEN LEONARD
ATTORNEY AT LAW
520 SW Sixth Avenue, Suite 920
Portland, OR 97204
(503) 224-0212

KATHRYN H. CLARKE
ATTORNEY AT LAW
921 SW Washington Street, Ste. 764
Portland, OR 97205
(503) 224-7963

QUESTIONS PRESENTED

1. Whether the ratio between compensatory and punitive damages comprises the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict.

2. Whether due process forbids a state from punishing a defendant for its egregious and profitable misconduct on the basis of the actual and potential effects of that misconduct throughout the state.

3. Whether state law that requires appellate courts to review facts in the light most favorable to the party for whom the jury ruled violates due process of law.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondent Mayola Williams respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Oregon Supreme Court's decision in this case. Williams is also obliged to point out a potential defect in the petition with respect to the second and third of the Petitioner's Questions Presented. Pet. at i. The second question concerns whether a jury may consider the impact of defendant's misconduct and its public health consequences on others within the state. Petitioner conceded that the jury could consider that impact during the trial, offered a jury instruction to that effect, and may not now use the issue as a basis for appellate review. The third question, concerning whether the evidence should be viewed in a light favorable to the jury's verdict in the course of *de novo* review, was neither before the court below nor addressed by that court. *See* Pet. at 10a (listing issues Petitioner asked the Oregon Supreme Court to consider) & at 11a (indicating which issues the court addressed). It should not be considered now.

STATEMENT OF THE CASE

This Court remanded this matter to the Oregon Court of Appeals for reconsideration in light of the intervening decision in *State Farm v. Campbell*, 538 U.S. 408 (2003). *Philip Morris USA, Inc. v. Williams*, 540 U.S. 801 (2003). In response, first the Oregon Court of Appeals and subsequently the Oregon Supreme Court scrupulously applied and carefully followed *State Farm*, with both courts holding that the jury's verdict was not grossly excessive but instead fully met constitutional requirements. The two courts arrived at the same conclusion: Petitioner's conduct was extraordinarily reprehensible and that the jury's verdict on punitive damages was entirely justified and fully consonant with the requirements of due process under the guidelines

established in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and further explained in *State Farm*.

Because it lost before those two courts, Petitioner Philip Morris now seeks this Court's review, pressing an issue it did not raise below, as well as one it conceded at trial, while advancing a self-serving and misleading rendition of the record and the decision below. Although Petitioner disagrees with the Oregon courts' application of the *BMW/State Farm* principles to the facts of this case, that disagreement provides no basis for further review by this Court, nor does it justify supervisory review of state court decision-making through the certiorari process.

In fact, Petitioner's expressed dissatisfaction with the Oregon courts' review of the record in this case necessarily makes its request to this Court either a "fact bound" inquiry or an assertion that any error "consists of a misapplication of a properly stated rule of law." Rule 10 of this Court's rules makes plain that petitions based on such claims of misapplication of the law or erroneous fact findings are "rarely granted." S. Ct. Rule 10. This petition does not comprise one of those rare instances where the matter is nonetheless certworthy. The petition should be denied.

After engaging in a thorough review of the record in this case, the Oregon courts each found that the Petitioner's conduct was at the extraordinarily high end of the reprehensibility spectrum and of a type that the state of Oregon deals with harshly. Petitioner's Questions Presented contain three complaints: (1) the trial court did not give a jury instruction proffered by Petitioner, even though it contained errors of law; (2) the punitive damages exceed a single-digit ratio when compared to the compensatory damages; and (3) the court below viewed the evidence in the record in the light most favorable to the verdict.

These are not grounds for certiorari. Granting the instant petition would encourage disappointed punitive damage defendants to seek certiorari as a matter of course with nothing more than a formulaic claim that a mathematical bright line should be employed. Such an approach would destroy the deterrent and retributive purpose of punitive damages by employing a one-size-fits-all approach that fails to fit the punishment to the crime.

That petitions for review of the punitive award could become standard operating procedure by defendants is not a time-limited concern. Petitions for certiorari raising issues of constitutional excessiveness are already regularly filed with this Court. *See, e.g., Boeken v. Philip Morris Inc.*, 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638 (Cal. App. 2 Dist. 2005), *cert. denied*, 126 S.Ct. 1567 (2006)(denying certiorari in a case involving $50 million in punitive damages). A defendant's dissatisfaction with a state court's application of *BMW* and *State Farm*, however, should not occasion a petition for certiorari. Sufficient safeguards exist in the state court systems without the need for yet another review of a verdict already confirmed through two levels of *de novo* review.

PHILIP MORRIS'S DEADLY FRAUDULENT SCHEME

When this case went to trial in 1999, Philip Morris was still engaged in an extensive and expensive campaign designed to deny the dangers of cigarette smoking, even though it knew better. Only after the jury's verdict did Petitioner begin to admit publicly and in later trials both the addictive qualities of cigarettes and their carcinogenic nature. The record shows that Philip Morris engaged in one of the longest running, most profitable, and deadliest frauds in history.

Jesse Williams died as a result of Philip Morris's lethal fraud. Tr. Vol. 9-B at 138, Vol. 11-B at 41; Ex. 159. By 1997, when Jesse Williams lost his battle with lung cancer, Philip Morris had known for at least 40 years that

cigarettes cause lung cancer and that millions of American smokers, about half of whom were its customers, were addicted to the nicotine in cigarettes. Pet. at 3a-7a; Tr. Vol. 12-B at 91-92, 9-A at 131-40, 11-A at 61-63; Ex. 50 at 1, 36 at 2. In an effort to maximize profit, Philip Morris either denied this knowledge outright, saying more research was needed, or disingenuously reassured its customers it would never jeopardize their health so as to create sufficient doubt to allow smokers to rationalize their behavior. Pet. at 38a-40a.

In 1952, *Reader's Digest* published an influential article on research findings that linked smoking with cancer. The article is credited with causing cigarette sales to fall for the first time in the twentieth century. Tr. Vol. 7-A at 109-10. To counter this trend, Philip Morris designed an elaborate public relations campaign to ensure that people continued to buy and smoke cigarettes. Pet. at 3a-4a. This campaign began with the publication of "A Frank Statement to Cigarette Smokers." The "Frank Statement," which first appeared as an advertisement in major newspapers throughout the United States, including Oregon, stated that Petitioner's cigarettes were not injurious to health and that smokers' health was a "basic responsibility, paramount to every other concern in our business." Pet. at 3a-4a; Ex. 7 at 2. The "Frank Statement" also announced the establishment of the Tobacco Industry Research Committee (TIRC) to conduct research into "all phases of tobacco and health." Pet. at 3a-4a.

This document was the beginning of Philip Morris's "common front" approach to creating doubt about the relationship between smoking and disease. Over the next decade, similar statements were broadcast to the public including that Philip Morris would "stop business tomorrow" if it thought that its product was harming smokers, and that "there was no connection" between smoking and disease or Philip Morris "wouldn't be in the

business." Pet. at 4a; Ex. 10, 11, 47, 161 at 1. When it made these statements, Philip Morris knew that "[s]moking causes lung cancer." Ex. 28 at 2, 32 at 1, Tr. Vol. 11-A at 62-63.

In response to the 1964 Surgeon General's Report, finding that smoking contributed substantially to mortality rates from lung cancer and other diseases, a Philip Morris vice president wrote that "we must, on a future basis, give smokers a psychological crutch and self-rationale to continue smoking." Pet. at 4a. Thereafter, the self-described "brilliantly conceived and executed" public relations strategy to "defend itself" in "litigation, politics, and public opinion" was altered from the "vigorous denial" approach to a "counter propaganda" plan. Ex. 80 at 7-8, 83 at 1. In short, the new plan was designed to suggest "ready-made credible alternatives" to the idea that smoking causes disease, while still insisting that there was "no proof that smoking causes cancer." Pet. at 4a. Philip Morris maintained this position as the industry leader throughout the 1970s, 1980s, and 1990s. *Id.* This campaign of misinformation, exactly as intended, provided tobacco-addicted smokers with a basis to continue to use cigarettes. Ex. 50, 161 at 1, 175.

The "counter propaganda" was not limited to the relationship between smoking and health. Ex. 36 at 2, 106. Publicly, Philip Morris also continued to deny that the nicotine in cigarettes was addictive. Ex. 148. Privately, Philip Morris concluded that "no other rationale is adequate to sustain the habit [of smoking] in the absence of nicotine." Ex. 72 at 2. The research director of Philip Morris described the company's understanding best by stating that "I think the thing that we sell most is nicotine." Ex. 109 at 1. Yet, the addictive properties of nicotine remained secret because corporate decisionmakers had concluded that "the entire matter of addiction is the most potent weapon a prosecuting attorney can have in the lung cancer/cigarette debate. We

can't defend continued smoking as 'free choice' if the person was 'addicted.'" Ex. 110 at 2.

To increase cigarette sales, Philip Morris dedicated years of study to the role of nicotine addiction in smoking. Ex. 39, 44 at 1, 53 at 1, 58 at 1, 91 at 2. Specifically, Philip Morris used data that suggested that "a smoker [has] daily intake quotas for tar and/or nicotine" to its financial advantage by introducing lower tar and nicotine cigarettes. Ex. 57 at 1, 134 at 1, 139 at 1. As smokers switched to lower tar and nicotine cigarettes, Philip Morris correctly predicted the smokers would increase their cigarette consumption to maintain their nicotine intake. Ex. 57 at 1.

Philip Morris's long standing fraudulent scheme was very successful. The company shipped 235 billion cigarettes and made a net profit of $1.6 billion the year that Jesse Williams died. Pet. at 74a; Tr. Vol. 14-A at 49-50, 55. In 1996, when Jesse Williams was diagnosed with lung cancer, Philip Morris made a net profit of $2 billion. *Id.* at 58. At the time of Jesse Williams's posthumous trial, Philip Morris had a net worth of more than $17 billion and a 51 percent domestic cigarette market share. Pet. at 74a; Tr. Vol. 14-A at 57.

It was established to the jury's and Oregon courts' satisfaction that Jesse Williams received and believed Philip Morris's false statements made on television and through the print media. Tr. Vol. 12-B at 49-50, 80. He told his wife that tobacco companies would not sell a product that caused cancer "because a tobacco company just would not do that." Tr. Vol. 12-B at 41. Moreover, as recently as 1994, Philip Morris published advertisements called "Facts You Should Know" in local newspapers, including the Portland *Oregonian*. Ex. 148. Among other things, the advertisements claimed that nicotine was not addictive. *Id.* Mr. Williams read the *Oregonian* and was generally a well-read person who liked to keep up with current events through magazines and newspapers. Tr. Vol. 15-B at 130, 147-48, 15-A at 55.

Mr. Williams tried a number of times to stop smoking, but he was "highly addicted," and his efforts were unsuccessful. Tr. Vol. 4-B at 20, 12-B at 46-47, 51-52, 71-73. After being diagnosed with lung cancer caused by cigarettes, Jesse Williams told his wife that he had been betrayed by the "cigarette people" who had "deceived" him, and that "they were lying all the time." Tr. Vol. 12-B at 85. After his death, his widow filed this lawsuit to "make a difference for people that had been denied the evidence that cigarettes could harm them" and "let other people know that they were being deceived." *Id.* at 93-94. The evidence led to a finding that Philip Morris purposefully misrepresented the facts in order to deceive smokers. Pet. at 3a. Philip Morris acknowledged that Jesse Williams relied upon its messages when, in lower court briefing, it argued that the record contained evidence that he "clung to Philip Morris' few public statements related to smoking and cancer." Defendant's Reply Br. in Or. Court of Appeals (*Williams I*), at 13.

During the 1999 trial, the court told counsel that the jury would be instructed that, pursuant to the prayer for relief, punitive damages would be limited to $100 million. Defense counsel told the court that this was "okay." Tr. Vol. 22-C at 87, 25 at 64. Philip Morris sought a jury instruction that stated, among other things, that the punitive damage award must bear a reasonable relationship to the compensatory damages and that "you may consider the extent of harm suffered by others" in determining punitive damages. Pet. at 14; Defendant's Reply and Cross Responding Br. in Or. Court of Appeals, at 37. Much of this proposed instruction was contrary to Oregon state law, and the trial judge refused the instruction. Pet. at 17a-18a. The jury was then instructed that only in-state conduct could be punished when assessing punitive damages, and the judge explicitly went through the six relevant Oregon punitive damage factors to consider under Or. Rev. Stat. § 30.925. Tr. Vol. 25 at 49-51. The trial judge also instructed the jury to focus only on whether Philip Morris's fraudulent conduct that

resulted in Jesse Williams's death was likely to cause serious harm in Oregon. Tr. Vol. 25 at 50-51.[1]

On March 30, 1999, the jury rendered its verdict. J. at 1. The jury found Philip Morris liable for fraud and awarded $21,485.80 in economic and $800,000 in non-economic damages.[2] The jury specifically found that "defendant ma[d]e false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied" and that "such false representations and reliance [were] a cause of damage to plaintiff." J. at 3-4. The jury then awarded $79.5 million in punitive damages. *Id.*

The jury also found Philip Morris liable on a claim of negligence but also found Jesse Williams was 50 percent negligent. The jury declined to award punitive damages on the negligence count.

The jury's punitive damages award amounted to two and one-half weeks' profit for defendant in the year in which Williams died. Tr. Vol. 14-A at 55. Upon Philip Morris's Motion for a Reduction of Punitive Damages, the trial court found the punitive damage award to be within the range that a rational juror could assess "based upon

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[1] Philip Morris purports to quote Plaintiff's counsel during oral argument to the effect that the jury was urged to punish Philip Morris for harms to other unidentified people. The Petition's quotation on this is actually an amalgam of two separate statements from two different lawyers in reverse order and utterly out of context. Both counsel's statements urged the jury to consider the impact of Philip Morris's fraudulent campaign on other Oregonians and the amount of money that it would take to deter them from continuing this highly profitable misconduct. The opinions below emphasize that the punitive damages were awarded for harm to Oregonians only. Pet. at 7a, 20a-21a, 23a, 33a, 41a, 66a, 69a, and 72a-73a.

[2] A statutory cap on noneconomic damages reduced the jury's $821,485 compensatory verdict to $521,485. Pet. at 3. The reduction was based on Or. Rev. Stat. § 18.560(1).

the record as a whole and applying Oregon, common law and statutory factors" but still reduced it to $32 million in accordance with perceived "federal standards." Pet. at 3; Appellant's Br. in Or. Court of Appeals (*Williams I*), at 39-40.

Both parties appealed. The Court of Appeals upheld the finding of fraud. It held that the evidence would permit the jury to find that Philip Morris affirmatively misrepresented that smoking was not harmful to a person's health and that it intended Mr. Williams and other Oregon smokers to rely on this misrepresentation. *Williams v. Philip Morris Inc.*, 48 P.3d 824, 833 (Or. Ct. App. 2002) (*Williams I*). Further, the court found that a number of Mr. Williams's statements constituted direct evidence that Mr. Williams received and relied upon defendant's misrepresentations. *Id.* at 834.

The court reviewed the Petitioner's excessiveness argument *de novo* under both the applicable state statutory criteria, Or. Rev. Stat. § 30.925, and the *BMW* guideposts. *Id.* at 836, 838-42. Among other things, the Court found Petitioner's behavior to be particularly egregious in this case because Philip Morris sought to make large amounts of money by engaging in a fraudulent scheme, over a period of four decades, to induce people to use or continue to smoke cigarettes despite the fact that smoking would cause serious illness or death in a significant percentage of people. *Id.* at 838-40. When addressing the ratio between punitive and compensatory damages, the court found that the ratio to potential harm was not one that "raises our judicial eyebrows" and amounted "to little more than two and a half weeks' profit." *Id.* at 841. Petitioner then sought further review in the Oregon Supreme Court, which denied the petition. 61 P.3d 938 (2002).

Upon remand from this Court in light of *State Farm*, the Court of Appeals readopted its previous opinion in all respects that were not superseded. Pet. at

36a. The court also found the jury award to be consistent with the *BMW* guideposts that this Court had reiterated in *State Farm*. Pet. at 67a-75a. In fact, the Court of Appeals found it "difficult to conceive of more reprehensible misconduct for a longer duration of time on the part of a supplier of consumer products to the Oregon public." Pet. at 73a. The Oregon Supreme Court affirmed, addressing only two issues: whether Philip Morris's proffered instruction was erroneously rejected and whether the punitive damages were unconstitutionally excessive. Pet. at 10a-11a. On the first issue, it determined that the proffered instruction was contrary to state law and properly rejected by the trial court. On the second issue, the Oregon Supreme Court concluded

> Philip Morris . . . engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number in that group. Under such extreme and outrageous circumstances, we conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process, . . .

Pet. at 33a.

REASONS FOR DENYING THE PETITION

I. THE OREGON SUPREME COURT FAITHFULLY FOLLOWED THIS COURT'S DECISION IN *STATE FARM*

A. Reprehensibility Remains the Most Important Indicium of Whether a Punitive Damage Award is Unconstitutionally Excessive

1. Petitioner misstates the importance of the reprehensibility guidepost

Petitioner focuses nearly exclusive attention on the second guidepost from *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996): "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." It treats that guidepost as if it were the conclusive and overriding test of excessiveness, subjugating the other guideposts to a limited and lesser role defined by the "ratio" guidepost. Pet. at i (question presented). In fact, Philip Morris misstates this Court's holdings by arguing that reprehensibility merely establishes where on the continuum of single-digit ratios the punitive damages should be pegged. *See* Pet. at 7 (arguing that this Court "has established a range of constitutionally permissible ratios and suggested that the degree of reprehensibility (and the amount of compensatory damages) will determine where within that range the constitutional cut-off falls in a particular case.") & 9 ("the degree of reprehensibility, among other factors, helps the court to determine which single-digit multiplier is appropriate.").

This Court confirmed in *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), that "[t]he most important indicium *of the reasonableness of a punitive damages award* is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419, quoting *BMW*, 517 U.S. at 575 (emphasis supplied). *See also Williams v. Kaufman County*, 352 F.3d 994, 1016 (5th Cir. 2003) (footnote omitted) (reprehensibility "receives the heaviest weight"). Petitioner's approach fails to give reprehensibility its appropriate weight.

Courts are to "determine the reprehensibility of a defendant['s misconduct] by considering" five factors:

> [W]hether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. at 419, citing *BMW*, 517 U.S. at 576-77.

Each of these aggravating factors supports the substantial award of punitive damages in this case. In fact, the evidence in this case points to a record of reprehensibility that is unique in American history. Philip Morris is a company worth $17 billion, built on sales of cigarettes, which in 1997 alone brought in profits of $1.6 billion.[3] Amazingly, Petitioner reaped these profits from selling a product that it knew would kill many of its own customers—not through misadventure or accident, but, when used as defendant *intended* them to be used. The crux of this case is Petitioner's purposeful misrepresentation of this knowledge for economic gain.

The numbers are staggering. Philip Morris cigarettes kill an estimated 200,000 Americans each year.[4] No other product sold in the U.S. kills as many as

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[3] The company shipped 235 billion cigarettes and made a net profit of $1,607,000,000 in 1997, the year that Jesse Williams died. Tr. Vol. 14-A at 49-50, 55.

[4] The evidence was that cigarette smoking kills more than 400,000 Americans each year. Tr. Vol. 9-B at 138, Vol. 11-B at 41. Evidence showed that Philip Morris has approximately 51% of the domestic cigarette market. Tr. Vol. 14-A at 57.

one in ten of its regular users.[5] How—especially in our increasingly health-conscious society—has Philip Morris managed to keep its customers smoking? One strategy, which lies at the heart of plaintiff's evidence in this case, has been a deadly, decades-long, fraudulent scheme to misrepresent the scientific facts about the risks of smoking and to exploit the addictive nature of nicotine. Starting in the early 1950s, as evidence linking cigarettes and cancer began to depress tobacco company profits, Petitioner and others in the industry devised a joint scheme to take advantage of the vulnerability of the class of addicted consumers they had created. They issued misrepresentations through the popular press well into the 1990s asserting that the link between smoking and disease is a matter of dispute among scientists and an open question that required further study. Petitioner knew not only that these statements aimed at smokers like Jesse Williams were false, but also that addicted smokers like Jesse Williams would cling to such statements and reports to rationalize their smoking and avoid the difficult ordeal of quitting, which their addictions made even more arduous.

As the Oregon Court of Appeals summarized the evidence in the record, Philip Morris "sought to make large amounts of money by engaging for more than four decades in a fraudulent scheme to induce people to use or continue to use a product that could cause serious illness or death." *Williams I*, 48 P.3d at 840.

2. *Petitioner does not dispute the strong state interest in punishing and deterring Philip Morris's life-threatening misconduct*

In its effort to portray the Oregon court's opinion as in conflict with *State Farm*, Petitioner ignores this

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[5] The jury, however, only considered the impact on smokers in Oregon, as it was instructed by the trial court.

Court's admonition that an award can only be fairly characterized as "grossly excessive" by viewing it in relation to the State's "legitimate interests in punishing unlawful conduct and deterring its repetition." *State Farm*, 538 U.S. at 416, quoting *BMW*, 517 U.S. at 568. "For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *Id.* There can be no disagreement regarding the paramount and legitimate interest Oregon has in punishing and deterring fraudulent misrepresentations, motivated by financial gain, with respect to consumer products that place its consumers at risk of serious injury or death for profit.

3. The fact that Philip Morris's misconduct "caused a significant number of deaths" was relevant to reprehensibility

Petitioner makes no assignment of error regarding the lower court's legal standard of reprehensibility, its application of the five factors outlined in *State Farm*, or the court's conclusion that Philip Morris's misconduct was highly reprehensible. Instead, Petitioner focuses almost entirely on what it characterizes as the claims of non-parties. Pet. at 14-22. The record evidence established that defendant's products "caused a significant number of deaths each year in Oregon." Pet. at 8a.

Such an acknowledgment by the supreme court and court of appeals does not run afoul of this Court's holding in *State Farm*, despite Petitioner's assertion to the contrary. Pet. at 16-19. *State Farm* condemned consideration of a "defendant's *dissimilar* acts, independent from the acts upon which liability was premised, [and which] may not serve as the basis for punitive damages." 538 U.S. at 422 (emphasis added). By contrast, the death of other smokers in Oregon was the consequence of the very same fraudulent scheme alleged

by plaintiff. The *State Farm* Court made clear that "conduct by [defendant] *similar* to that which harmed [plaintiffs]" is relevant to reprehensibility. *Id.* at 424 (emphasis added). Indeed, this Court has consistently stated that "repeated misconduct is more reprehensible than an individual instance of malfeasance," *Id.* at 423, quoting *BMW*, 517 U.S. at 577. This Court added that "courts should look to 'the existence and frequency of similar past conduct'" in evaluating reprehensibility. *Id.*, quoting *TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 443, 462 n.28 (1993) and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991).

The Oregon courts properly considered the harm to other smokers resulting from Philip Morris's misrepresentations to show what this Court subsequently called the degree of a defendant's "indifference to or a reckless disregard of the health or safety of others." 538 U.S. at 419. Indeed, the *State Farm* Court added that even out-of-state conduct, if similar to that directed at plaintiffs, would also be relevant to reprehensibility. *Id.* at 422.

Finally, there is no merit to Petitioner's argument that permitting punishment for harms to nonparties conflicts with *State Farm* and constitutes a recipe for multiple punishments. Pet. at 15. First, as detailed above, this Court in *State Farm* made clear that such evidence of repeated or similar misconduct resulting in harm to others *is relevant* to reprehensibility and thus to the reasonableness of punishment. 538 U.S. at 423. Second, Oregon, by statute, Or. Rev. Stat. § 30.925(2)(g), protects defendants from multiple punitive damage awards for the same course of conduct. *See also* Pet. at 66a-67a.

In conclusion, the harm caused by Petitioner "was physical as opposed to economic," "evinced . . . a reckless disregard of the health or safety of others," targeted "financial[ly] vulnerabl[e]" people, "involved repeated actions" over the course of four decades, and was the

product of "trickery, or deceit." *Compare State Farm*, 538 U.S. at 419. All of the potential elements this Court identified as establishing high reprehensibility were present in the extreme.

B. The Oregon Court's Application of the "Ratio" Guidepost Does Not Conflict with *State Farm*

1. State Farm does not hold that punitive damages must conform to a single-digit ratio

Philip Morris reads this Court's opinion in *State Farm* as if it established a categorical limitation on the size of a punitive damage award. Pet. at 7. Yet, this Court could not have been more plainspoken in rejecting that approach to punitive damages. Contrary to Petitioner's assertion that awards must fall within a single-digit ratio unless the compensatory damages are so small as to make that number inconsequential, Pet. at 8, this Court reiterated in *State Farm:*

> '[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.' We decline again to impose a bright-line ratio.

538 U.S. at 424-25, quoting *BMW*, 517 U.S. at 582 (emphasis in original, citation omitted).

As if that were not clear enough, *State Farm* emphasized that "there are no rigid benchmarks that a punitive damages award may not surpass." *Id.* at 425. This Court stressed that its referenced ratios *"are not binding." Id.* (emphasis added).

Responding to an argument like Petitioner's here that *State Farm* established an immutable ratio, Judge Richard Posner, speaking for the U.S. Court of Appeals for the Seventh Circuit, wrote: "The Supreme Court did

not, however, lay down a 4-to-1 or single-digit ratio rule . . . and it would be unreasonable to do so." *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003).

Nor do the decisions Petitioner cites as creating conflicts on this issue actually stand in conflict. Rather than hold that 9:1 is the constitutional maximum, Pet. at 14, *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005) examined, with approval, earlier Ninth Circuit punitive damage rulings, finding that a variety of awards, ranging from 2.6:1 to 28:1 all met constitutional muster. *Id.* at 954-57. It then found, in the case before it involving the difficult assessment of punitive damages where there were multiple plaintiffs and multiple defendants, that circumstances justified a substantial punitive damages award and that a 9:1 ratio did not offend "constitutional sensibilities." *Id.* at 963. No mandatory single-digit ratio requirement was established by the Ninth Circuit.

Similarly, in each and every one of Petitioner's claimed conflicts among the lower courts, *see* Pet. at 12-13 n.5, the decisions engage in a fact-intensive constitutional inquiry in order to fit the punitive award to the misconduct. *See, e.g., Clark v. Chrysler Corp.*, 436 F.3d 594, 602 (6th Cir. 2006)(finding Chrysler's conduct not to be "sufficiently indifferent or reckless to support a $3 million award"); *Conseco Fin. Servicing Corp. v. North Am. Mortgage Co.*, 381 F.3d 811, 825 (8th Cir. 2004)(large compensatory damage award "in the 'absence of extremely reprehensible conduct against the plaintiff or some special circumstance'" could not support a large exemplary award)(citation omitted); *Bach v. First Union Nat'l Bank*, 149 Fed. Appx. 354, 366 (6th Cir. 2005)(finding punitive damages excessive where large compensatory award was accompanied by "only one of the five reprehensibility factors"); *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004)(finding punitive damages excessive because the award "reflects

bias and a focus on irrelevant considerations," the compensatory award was substantial, and punitive verdict was many times defendant's net worth). None of these cases establishes the mathematical bright line that Petitioner claims.

High ratios between actual and punitive damages may be justified by the facts of a case. This Court has recognized the fact-intensive nature of this inquiry. In *State Farm*, it emphasized that the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425 (suggesting that a 500-to-one ratio could also be justified under the proper circumstances).

It is worth noting that the ultimate result in *State Farm*, whose misconduct merely "merit[ed] no praise," *id.* at 419, was $9 million punitive damage award and a $1 million compensatory damage award. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah), *cert. denied*, 543 U.S. 874 (2004). Under Petitioner's proposed regime, Philip Morris's exponentially more egregious and reprehensible conduct would justify a smaller award than the "minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them." *State Farm*, 538 U.S. at 426. Such a result, considering the absence of aggravating factors in *State Farm* and the overwhelming presence of them here, would be inconsistent with this Court's punitive damage mandates in which the punishment should fit the misconduct.

2. *State Farm does not limit double-digit ratios to cases involving small compensatory damage awards*

Petitioner concedes only a solitary exception to the rigid single-digit ratio it wrongly claims is required: a case in which the compensatory award is so small that a single-digit multiple would amount to an inconsequential

penalty. Pet. at 8. This Court has not adopted so narrow a conception of when a larger award is merited. In fact, this Court articulated at least three non-exclusive examples of situations that merit higher punitive damage ratios:

1) Where "'a particularly egregious act has resulted in only a small amount of economic damages'", *State Farm*, 538 U.S. at 425 (citation omitted);

2) Where "'injury is hard to detect'", *id.* (citation omitted); and,

3) Where "the monetary value of noneconomic harm might have been difficult to determine", *id.* (citation omitted).

In addition to these explicit *State Farm*-endorsed justifications for punitive awards above the suggested single-digit ratio, other courts have found additional justifications for higher punitive awards, including the following relevant ones:

1) Where the probability of detection is very low, *see, e.g., Mathias*, 347 F.3d at 676;

2) Where the misconduct is potentially lucrative, *id.*; and,

3) Where wealth enables "the defendant to mount an extremely aggressive defense . . . [and] by doing so . . . make[s] litigating against it very costly, *id.* at 677.

State Farm left the door open even to triple-digit ratios when the facts and circumstances warrant it in the judgment of the jury and reviewing court. 538 U.S. at 425. In this case, the harm visited upon Jesse Williams was agonizing, ultimate, and irreplaceable. Yet, damages in wrongful death cases are difficult to set and "cannot be fully captured in money value." *Williams I*, 48 P.3d at 842. Under Oregon's wrongful death statute, as in most states, compensatory damages are based on the monetary losses of decedent's family, such as medical bills, burial

costs, and loss of the decedent's economic contribution to the family.[6] *See* Or. Rev. Stat. § 30.020. Damages for wrongful death are also artificially capped at $500,000, regardless of the amount the jury determines is necessary to compensate for any losses, regardless of the number of survivors. Or. Rev. Stat. § 18.560.

For these reasons, it is widely recognized that "[w]rongful death damages fail to compensate for the harm to decedent." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 941-42 (1998). *See also* William Landes & Richard Posner, THE ECONOMIC STRUCTURE OF TORT LAW 187 (1987)(The measure of recoverable damages "results in a systematic underestimation of damages in wrongful-death cases."). Thus, the amount of compensatory damages awarded in wrongful death cases, such as this one, does not represent the extent of the harm caused by the defendant, but merely the monetary loss to the surviving family. Nor can it be said that the $500,000 in compensatory damages awarded in this case were "substantial" or "complete compensation" for the life that was taken.[7] *Compare State Farm*, 538 U.S. at 426 (finding $1 million to compensate plaintiff for 18 months of mental suffering substantial and complete compensation).

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[6] In Oregon, the surviving spouse and children are also entitled to noneconomic damages for loss of the "society, companionship and services of the decedent." Or. Rev. Stat. § 30.020(2)(d).

[7] Studies attempting to place a monetary value on the loss of life have arrived at estimates ranging from $3-$7 million. W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations In Environmental and Safety Torts*, 87 GEO. L.J. 285, 314 (1998). "Court awards for compensatory damages after fatalities are typically well below that amount." *Id.*

Even if the Court were inclined to tie punitive damages more rigidly to compensatory damages, a wrongful death case such as this one is an especially poor vehicle to do so. Fewer than half the states permit punitive damages in wrongful death cases. 1 John J. Kircher & Christine M. Wiseman, PUNITIVE DAMAGES: LAW AND PRACTICE § 5.10 (2d ed. 2000). As one commentator has noted, "[w]rongful death is an area of the law in which the measurement of loss in pecuniary terms presents intractable difficulties." Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 30 n.140 (1982). A scholar who found a general correlation in awards between punitive and compensatory damages also discovered that "[t]he one exception to that pattern was in wrongful death cases." Michael L. Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 79 IOWA L. REV. 1, 64 (1992).

Even scholars who advocate complete abolition of punitive damages acknowledge that wrongful death cases present an atypical situation of systematically low compensatory awards where punitive damages might be "needed to create adequate deterrence." Viscusi, *supra*, 87 GEO. L.J. at 334. For this reason, a wrongful death case presents a poor vehicle for this Court to establish a rigid ratio rule.

An additional difficulty is that, because compensatory wrongful death damages largely reflect the financial contribution of the decedent, awards for the wrongful death of a child or a nonworking spouse are comparatively low. Polinsky & Shavell, *supra*, 111 HARV. L. REV. at 941 n.229. Consequently, the constitutional presumption urged by Petitioner amounts to a presumption that, as a matter of law, the wrongdoer who kills a child or nonworking spouse is less deserving of punishment or deterrence than one who kills a healthy wage earner. The same rule of law would deem it more important to punish and deter misconduct that kills a

wealthy neurosurgeon rather than a semi-retired school janitor such as Jesse Williams. Tr. Vol. 12-B at 36-37. That such a rigid rule of inequality should be read into the Fourteenth Amendment is particularly inappropriate.

Beyond the issues posed by death's differences, this was a fraud that was difficult to detect and prove, as well as one in which Petitioner expended untold sums to hide and defend. Moreover, considering the huge profits pursued and obtained by Philip Morris in perpetuating this very successful fraud, it is not difficult to say that this punitive damage award was proportionate to the wrong committed.

II. PETITIONER'S PROFERRED JURY INSTRUCTION WAS PROPERLY REJECTED BY THE OREGON COURTS

A. State Farm Does Not Require a "Proportionality" Jury Instruction

Nothing in *State Farm* requires or suggests that a jury must be instructed as to the relationship between punitive and compensatory damages. In fact, the only mention of a mandated jury instruction in *State Farm* relates to advising the jury that "it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422. That instruction was given in this trial. Tr. Vol. 25 at 49-51. Of course, fraud is illegal in every state.

Even if such a "proportionality" instruction were advisable, the availability of *de novo* judicial review renders its absence harmless. Further, the instruction proffered by Philip Morris misstated the law and contradicted itself. The trial court had no obligation to adopt it and no obligation to rewrite it to correct its errors. The requested instruction said, in pertinent part:

> The size of any punishment should bear a reasonable relationship to the harm caused

> to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others *in determining what that reasonable relationship is,* you are not to punish defendant for the impact of its alleged misconduct on other persons . . .

Pet. at 14.

Plainly, the proposed instruction would have allowed the jury to consider harm to others in determining the reasonable relationship, or ratio of punitive to actual damages, which is precisely what Petitioner now says is improper. If it were improper, then giving the instruction would have been invited error. *See United States v. Deberry,* 430 F.3d 1294, 1302 (10th Cir. 2005)(explaining the invited-error doctrine). *See also Seaboard Air Line Ry. Co. v. Watson,* 287 U.S. 86, 89-90 (1932)(applying doctrine to proposed jury instructions).

Petitioner's proposed instruction was also erroneous as a matter of Oregon law. It would have told the jury not to be "influenced by the defendant's financial condition . . ." Defendants Requested Jury Instruction No. 34 at 2. Yet, a defendant's financial condition is explicitly made relevant to punitive damages by state statute, Or. Rev. Stat. 30.925(2)(f), and the *State Farm* decision clearly noted that, while wealth may not otherwise justify an unconstitutional punitive damage award, this "does not make its use unlawful or inappropriate." *State Farm,* 538 U.S. at 428, *quoting BMW,* 517 U.S. at 591 (Breyer, J., concurring). Moreover, a defendant's "financial condition" could well include its profitability, which, here, depended on its fraudulent scheme. It is entirely proper to assess punitive damages in an amount that disgorges ill-gained profits. *See, e.g., Mathias,* 347 F.3d at 676.

In Oregon, a trial court need not give an instruction that contains errors of law. *Simpson v. Sisters of Charity,* 284 Or. 547, 560 (1978). The trial court

correctly rejected Petitioner's proposed instruction, and the Oregon Supreme Court appropriately found no error in that ruling. Pet. at 18a.

B. Oregon May Consider the Impact on Defendant's Fraudulent Scheme on its Other Residents

The Oregon courts properly limited their consideration of harm to others to in-state victims of the same fraudulent conduct. This Court has never found that to be inappropriate. For example, in *BMW*, this Court reasoned that neither plaintiff Gore nor "any other BMW purchaser" was threatened with additional harm by defendant's misconduct. *BMW*, 517 U.S. at 582. This Court suggested a proper ratio of harm would be based not only on harm to the plaintiff but also on "the total damages of all 14 Alabama consumers who purchased repainted BMWs." *Id.* at 582 n.35. This Court described as "error-free" the portion of the jury's verdict that was based on the harm suffered by 14 victims of BMW's misconduct. 517 U.S. at 567 n.11.

Nothing in *State Farm* either explicitly or impliedly changes this aspect of *BMW*. The problem identified in *State Farm* was the state court's use of dissimilar, out-of-state conduct to justify the punitive damages award. *State Farm* said that a state does not have "a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *State Farm*, 538 U.S. at 421. Far from holding that in-state harm to others could not be considered, *State Farm* found there was no evidence of such harm, stating that the plaintiff's inability to point to "testimony demonstrating harm to the people of Utah . . . indicates that the adverse effect on the state's general population was in fact minor." *State Farm*, 538 U.S. at 427.

Moreover, the Petitioner is wrong when it asserts that the Oregon Supreme Court's approach to harm to

others is in conflict with the California Supreme Court and the Eighth Circuit. Pet. at 19. In *Johnson v. Ford Motor Co.*, 113 P.3d 82 (Cal. 2005), one of the cases Petitioner claims is in conflict, the California Supreme Court read *BMW* and *State Farm* to make

> clear that due process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's illegal or wrongful conduct toward others that was similar to the tortious conduct that injured the plaintiff or plaintiffs.

Id. at 90-91. *See also id.* at 93 ("Nothing the high court has said about due process review requires that California juries and courts ignore evidence of corporate policies and practices and evaluate the defendant's harm to the plaintiff in isolation.").

Similarly, the Eighth Circuit did not hold that misconduct toward a particular plaintiff must be considered in isolation, but instead merely warned against defining a course of misconduct at such a "high level of abstraction" that a plaintiff can use any prior bad acts as evidence of recidivism. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004).

In this case, there was ample evidence that Philip Morris harmed many other Oregonians and did so on a continuous basis, rather than through a series of individually condemnable acts affecting distinct individuals separately. Moreover, Petitioner spent considerable time, effort, and money constructing and maintaining its fraudulent scheme in order to reap financial success. Philip Morris conceded in its motion to reduce punitive damages in the trial court that its fraudulent campaign "affected an undetermined (but surely relatively small) number of people such as Jesse Williams." Defendant's Reply Memorandum in Support of Motion for Reduction of Punitive Damages Award at 2,

lines 4-6. Philip Morris also conceded the relevance of harm to others and that others in Oregon were harmed when it argued, in the same pleading, that any award for harm in Oregon should be proportionately smaller than a punitive award in a California case simply because Oregon had a smaller population. *Id.* at 20. As the Court of Appeals recognized,

> there is evidence concerning other Oregon victims of defendant's decades-long fraudulent scheme. The tobacco industry and defendant directed the same conduct toward thousands of smokers in Oregon. They all received the same representations, from the same entities, and through the same media, and the industry intended to induce Oregon smokers to act on those representations in the same way. That conduct was a fundamental part of defendant's business strategy; Williams was simply one of its many Oregon victims.

Pet. at 66a.

Philip Morris congratulated itself internally on its "brilliantly conceived and executed" fraudulent scheme. Ex. 83 at 1. There was more than enough evidence to allow the jury to determine that Petitioner's scheme succeeded with Oregonians other than Jesse Williams.[8]

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[8] There is little danger in Oregon of that consideration resulting in multiple punishments for the same conduct because, by statute, the state provides for consideration of past punitive damage awards precisely to prevent that possibility. Pet. at 66a-67a, citing Or. Rev. Stat. 30.925(2)(g).

III. THE OREGON COURTS' RESPECT FOR THE JURY VERDICT DOES NOT VIOLATE ITS OBLIGATION TO PROVIDE *DE NOVO* REVIEW

Petitioner argues here for the first time that the Oregon courts, in the course of a *de novo* review of this punitive damage award, should not have viewed the evidence in the light most favorable to the prevailing party. Pet. at 22a. This Court should not entertain this issue because Petitioner failed to preserve it below. If the Court considers it at all, the question presented clearly favors affirmance.

As this Court has made clear, appellate review of punitive damages is *de novo* with respect to the *trial court's* decision on the constitutionality of the punitive damage award. The appellate court does not reweigh the facts and review the jury's award itself *de novo*. *See Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 n.14 (2001). Punitive damage review decides whether a jury's verdict is grossly excessive, not whether it is the same verdict the court would have reached had it sat in the jury box.[9]

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[9] Petitioner's attempt to create a conflict with a few state courts on this issue should be rejected. Pet. at 23 & n.12. For example, in *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63 (Cal. 2005), the California Supreme Court did not hold, as Petitioner contends, that the facts should not be read in a favorable light to the plaintiff where there is no express factual finding. Instead, it found that the appellate court erred in presuming the size of the actual loss from the size of the punitive damage verdict. *Id.* at 70. That narrow ruling cannot support Petitioner's broad proposition. Nor do any of Petitioner's other citations amount to a conflict over viewing the facts favorably to the prevailing party. *See Wolf v. Wolf*, 690 N.W.2d 887, 894 (Iowa 2005)(engaging in *de novo* review only in assessing the application of the *BMW* guideposts); *Park v. Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *13-14 (Guam Nov. 16,

After this Court, in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), required Oregon to provide judicial review of punitive damages for excessiveness, the Oregon Supreme Court held that such an award would "not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole." *Oberg v. Honda Motor Co.*, 888 P.2d 8, 10 (Or.), *cert. denied*, 517 U.S. 1219 (1996). This standard was subsequently codified by the Oregon legislature. Or. Rev. Stat. § 31.730. In adopting the "rational juror" standard, Oregon was not writing on a blank slate. In the federal *Oberg* decision, this Court found no defect in the use of "different verbal formulations" of the standard of review because:

> There may not be much practical difference between review that focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence." All these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia*, [443 U.S. 307, 324 (1979)](whether "*no rational trier of fact* could have" reached the same verdict).

512 U.S. at 432 n.10 (emphasis added). It is clear, then, that the "rational juror" standard and *BMW 's* "grossly excessive" standard are constitutionally compatible.

Federal courts utilize the "rational juror" standard in both criminal and civil matters. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Courts apply the standard whether reviewing asserted errors where proof must be beyond a reasonable doubt, clear and convincing, or by preponderance of the evidence. *Id.* Punitive

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2004)(same); *Aken v. Plains Elec. Generation & Transmission Co-Op, Inc.*, 49 P.3d 662, 668 (N.M. 2002)(same).

damages pose no unique problem that requires departure from this familiar and stringent standard.

Moreover, this Court has recognized that the Oregon Constitution accords the jury, even in punitive damage cases, authority to set damages and found that this status "compel[s] the treatment of punitive damages as covered [by the right to a jury trial]". *Cooper Indus.*, 532 U.S. at 437 n.10 (2001). Respect for state authority should also compel this Court to recognize Oregon's efforts to apply its own constitutionally compelled standard to supplement, but not replace this Court's punitive damage rulings. The Oregon courts fully engaged in the the *de novo* application of the *BMW* guideposts, as informed by *State Farm*. Pet. at 21a-33a, 67a-75a. *See also State v. Rogers*, 4 P.3d 1261, 1278 n.8 (Or. 2000)(appellate courts review legal questions "anew and without deference to the decisions of trial courts"). The *Cooper* decision does not require Oregon to abandon its respect for jury findings. Even under the lesser jury trial standard available under the Federal Constitution, this Court said:

> [N]othing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings [as are relevant to determining a punitive verdict.]

Cooper Indus., 532 U.S. at 439 n.12.

The rational juror rule satisfies due process and sufficiently assures, in combination with the *BMW* guideposts, that "punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. *Haslip*, 499 U.S. at 20-21.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT S. PECK*
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2809

JAMES S. COON
RAYMOND F. THOMAS
SWANSON THOMAS & COON
621 SW Morrison Street, Suite 900
Portland, OR 97205
(503) 228-5222

WILLIAM A. GAYLORD
GAYLORD EYERMAN BRADLEY, P.C.
1400 SW Montgomery St.
Portland, OR 97201
(503) 222-3526

CHARLES S. TAUMAN
BENNETT HARTMAN MORRIS & KAPLAN
P.O. Box 19631
Portland, OR 97280
(503) 849-9821

MAUREEN LEONARD
ATTORNEY AT LAW
520 SW Sixth Avenue, Suite 920
Portland, OR 97204
(503) 224-0212

KATHRYN H. CLARKE
ATTORNEY AT LAW
921 SW Washington Street, Ste. 764
Portland, OR 97205
(503) 224-7963

May 1, 2006 **Counsel of Record*

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In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

PETITIONER'S REPLY BRIEF

KENNETH S. GELLER
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

Counsel for Petitioner

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Richard L. Blatt, *et al.*, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE §§ 7.11-7.60 (2005) 5

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Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982) 5

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W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285 (1998) 5

PETITIONER'S REPLY BRIEF

The Brief in Opposition ("Opp.") perfectly illustrates the need for this Court's review. It reflects the widespread confusion and debate as to the meaning of *State Farm Mutual Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003). It champions positions that not only are the subjects of splits of authority but will have grave practical consequences if permitted to persist.

Respondent simply ducks the first question presented: whether a finding of high reprehensibility can "override" the lack of a reasonable relationship between punitive and compensatory damages. She not only declines to defend the Oregon Supreme Court's holding in that regard but fails even to acknowledge it. Perhaps because that ruling is indefensible and implicates a conflict, respondent instead attacks a straw man, noting repeatedly that reprehensibility is the most important indicium of excessiveness and that *State Farm* established no "bright line test" for acceptable ratios. Those uncontroversial propositions are not at issue here.

With regard to the second question presented, respondent – like the Oregon Supreme Court – fails to recognize the distinction drawn by this Court between punishing the defendant for causing harm to others not before the court and considering that harm for purposes of assessing the reprehensibility of the specific conduct that injured the plaintiff. Evidence of similar wrongs plays a role comparable to that of recidivism in the criminal context, which may be relevant in determining where, within a permissible range of criminal sentences, a particular defendant's sentence should lie for the particular crime at issue. Just as recidivism may enhance the sentence for a crime but cannot be used to impose punishment for earlier crimes, punitive damages may not punish for the alleged harms to others. Under *State Farm*, evidence of similar wrongs may never justify a puni-

tive damages award that exceeds the maximum ratio permitted by due process. *Id.* at 423. Respondent and the Oregon Supreme Court, however, would allow the punitive damages proceeding in an individual case to serve as a pseudo-class action, in which punishment is imposed on behalf of all in-state residents allegedly harmed by a course of conduct – despite the fact that each remains free to sue on his or her own behalf, and despite the absence of the safeguards associated with a true class action. Respondent's brief eliminates any doubt that this important, recurring issue is squarely presented here.

In addition, like the court below, respondent defends a toothless form of "de novo" review. But her claim that taking all facts in the light most favorable to the plaintiff reflects a "respect for jury findings" fails to come to grips with the fact that the jury in this case ***made no findings*** relevant to the size of its punitive award. That is a pervasive issue in punitive damages cases, and it is the subject of a conflict with a recent decision of the Supreme Court of California.

Review is particularly necessary here. The Oregon Supreme Court has never reduced a punitive award. Its decision in this case – reaffirming, after a GVR from this Court, a punitive award that is nearly ***100 times*** the size of respondent's substantial compensatory award – disregards *State Farm* and declares that there are no limits at all on punitive damages when a court deems conduct to be reprehensible. It is an affront to due process and to the rulings of this Court.

Finally, the "enormous potential liability" at issue in this case is itself "a strong factor in deciding whether to grant certiorari." *Fid. Fed. Bank & Trust* v. *Kehoe*, 126 S. Ct. 1612 (2006) (Scalia, J., concurring in the denial of certiorari). If review is denied, petitioner will face a $130,000,000 judgment (including interest) in an individual-plaintiff case, based on the Oregon Supreme Court's insupportable reading of *State Farm*. That should not be permitted to occur.

A. The Question Whether The Ratio Guidepost May Be "Overridden" Is Squarely Presented, Is The Subject Of A Split Of Authority, And Is Recurring And Important.

From reading respondent's brief, one would never know that the court below expressly acknowledged that the massive judgment under review fails to satisfy the requirements of the ratio guidepost. Nor does respondent's brief contain a single word about the Oregon Supreme Court's holding that "the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may arise from a double-digit ratio." Pet. App. 33a.

Respondent's silence is understandable. The framework adopted by the Oregon high court, in which reprehensibility can "override" the reasonable-relationship guidepost, cannot be reconciled with the holdings of this Court or the holding of the Ninth Circuit in *Planned Parenthood of the Columbia/Willamette* v. *American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005).[1] Respondent asserts uncontestable platitudes such as "reprehensibility remains the most important indicium of whether a punitive damage award is unconstitutionally excessive" and "*State Farm* does not hold that punitive damages must conform to a single-digit ratio." But the question presented is not whether the reprehensibility

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[1] Respondent's half-hearted effort (Opp. 17) to minimize the conflict with the Ninth Circuit fails. *Planned Parenthood* clearly recognized that the ratio guidepost cannot simply be ignored because the other two criteria identified in *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996) favor a high award. It held that, in most cases, the maximum constitutionally permissible ratio will be somewhere between 1:1 and 9:1 and that the reprehensibility and comparable-penalties guideposts determine where along that spectrum a particular case will fall. 422 F.3d at 962. The decision of the Oregon Supreme Court in this case is in direct conflict with the Ninth Circuit's framework.

guidepost is more important than the other guideposts or under what circumstances ratios greater than 9:1 might be "reasonable." Rather, the question presented by the petition and the ruling below is whether a court's subjective determination of high reprehensibility "overrides" the requirement that there be a reasonable relationship at all. As shown in the petition (and the brief of amicus Product Liability Advisory Council), that issue is worthy of this Court's review.

The disarray in the lower courts is well illustrated by comparing the decision here with *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 598 (8th Cir. 2005). In that suit against a tobacco company for injuries allegedly caused by smoking, the court found that the defendant's conduct was "highly reprehensible." *Id.* at 602-603. Unlike the Oregon Supreme Court, however, the Eighth Circuit applied *State Farm* faithfully. It held that – high reprehensibility notwithstanding – a ratio of 1:1 was the most that due process would sustain, given the high compensatory damages. Obviously no two cases are exactly alike, and (as we acknowledged in the petition) there is no such thing as a one-size-fits-all ratio. But a legal regime that approves ratios varying nearly a hundredfold in two comparable cases involving similar, "highly reprehensible" conduct by two similarly situated defendants is one that needs attention.

Against that backdrop of inconsistent holdings, the Oregon Supreme Court's ruling is particularly dangerous. It says that, when conduct can be characterized as highly reprehensible, there need not be a reasonable relationship between compensatory and punitive damages at all. If *BMW* and *State Farm* mean anything, they must foreclose that holding.

Respondent suggests (Opp. 21) that this case might not be a good vehicle because "[f]ewer than half the states permit punitive damages in wrongful death cases." In addition to being irrelevant (the Oregon Supreme Court's broad holding is in no way limited to any particular cause of action), that

assertion is wrong: a clear majority of the states that allow punitive damages ***at all*** permit them in wrongful death cases. The list includes states in all but two Circuits. Richard L. Blatt, *et al.*, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE §§ 7.11-7.60 (2005).[2]

Whether wrongful death cases – or some other category of disputes – provide a context in which higher ratios may be reasonable is a subsidiary issue that also has engendered confusion in lower courts. This Court has never said that they do, and its decisions suggest otherwise. But regardless, those matters are not relevant to the certiorari analysis. They are properly addressed at the merits stage, if at all.

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[2] Respondent also offers a law-and-economics argument in favor of high ratios in wrongful-death cases. See Opp. 18-22. That argument is beside the point, because the Oregon Supreme Court did not rely on any peculiarities of compensation for wrongful death in issuing its doctrinal holding. To the contrary, the holding here – the proposition for which this case will be cited – is that high reprehensibility can override a finding that the relationship between punitive and compensatory damages is not reasonable. In any event, respondent's theory is unsupported by the very authorities she cites. Polinsky and Shavell, for example, conclude that "[p]unitive damages should not be awarded to correct for inadequate compensatory damages." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 942 (1998); see also W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 314 (1998) ('punitive damages in such instances create inefficiencies"); Dorsey Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 31 (1982) ("If the absence of a market makes it impossible for courts to determine the value of a loss, it likewise makes it impossible for them to determine the amount of punitive damages that would produce an efficient level of deterrence.").

B. The "Harm To Others" Question Is Squarely Presented, Is The Subject Of A Circuit Split, And Is Recurring And Important.

As an initial matter, respondent's suggestion that petitioner waived the second question presented is baseless. All petitioner "conceded" in its proposed jury instruction was the proposition that harm to others can be relevant to reprehensibility – an accurate statement of the law. Respondent is again confusing consideration of harm to others for its bearing on reprehensibility with directly punishing for such harm. In fact, the proposed instruction drew the very distinction that we draw here, and that is the clear import of *State Farm*: The jury may consider the scope of the defendant's conduct in evaluating the reprehensibility of the acts that harmed the plaintiff (*i.e.*, it may use the course of conduct as a basis for selecting a punishment higher in the range of permissible punishments for the harm to the plaintiff), but it may not ***punish*** the defendant for harms to nonparties (*i.e.*, it may not use those harms as a basis for exceeding the range of permissible punishments for the harm to the plaintiff).

This Court has repeatedly reaffirmed not only the existence of this distinction but its importance in the law. In the criminal context, this Court has upheld the constitutionality of recidivism statutes which enhance the sentence for a crime based on the defendant's prior criminal activity. In so doing, this Court made clear that punishing for prior criminal activity would be unconstitutional. Enhancing the sentence imposed for the particular crime because of the defendant's repeated criminal conduct is permissible, within the statutorily prescribed range for the offense of conviction, because the prior conduct makes the crime more reprehensible and increases the need for a stiffer sentence to deter future criminal conduct. *United States* v. *Watts*, 519 U.S. 148, 154 (1997). Similarly, just as recidivism cannot be used to impose punishment for earlier conduct, punitive damages may not punish for the alleged harms to others. Indeed, the *State*

Farm Court was careful to limit the extent to which harm to others can be considered, stating that courts may not "adjudicate the merits of other parties' hypothetical claims under the guise of reprehensibility analysis." 538 U.S. at 423. Thus, injuries incurred by nonparties cannot justify a departure from the requirement of proportionality between the punishment and the harm to the plaintiff. Respondent's (and the Oregon Supreme Court's) apparent belief that punishing for harm to others is no different from considering that harm in assessing reprehensibility serves only to confirm the need for guidance and clarification from this Court.

In the end, respondent is left to argue that this Court should deny certiorari because the Oregon Supreme Court was correct in holding that it is perfectly acceptable to use a single punitive award in an individual plaintiff's trial to punish for harm to all residents of the state. As noted in the petition (at 19), the Supreme Court of California and the Eighth Circuit disagree with that position. The issue thus could not be more squarely joined.

Nor could it be more important. As amicus the Chamber of Commerce of the United States explains, the "total punishment" approach embraced by respondent and the court below invites excessive, multiple punishment. In that regard respondent's reference to "the vulnerability of ***the class*** of addicted consumers" (Opp. 13 (emphasis added)) is telling. As much as respondent (and the Oregon Supreme Court) might wish to treat it as one, this case was not a class action, and therefore petitioner lacked the procedural protections attendant to one.

The problem cannot be solved by the prospect of future "credits" for paid awards. See Opp. 15, 26 n.8. As Professor Colby has explained:

> When a defendant engages in a course of conduct that allegedly harms a large number of people, ***many of the alleged victims, if they bring their own***

> ***lawsuits, will not prevail***, or perhaps will be unable to convince the jury that the defendant's conduct was sufficiently malicious to warrant the imposition of punitive damages.

Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 596 (2003) (emphasis added; footnote omitted). In that event, there will be no occasion for the defendant to receive "credit" for the earlier punitive award; nor can there be any justification for allowing a single jury to punish for harm to others for which other juries have exonerated the defendant. Indeed, the California Supreme Court has observed – in a case that conflicts directly with the decision below – that forcing defendants to play this high-stakes game of roulette "present[s] a problem of 'successive prosecution' in which a defendant that loses a single case would also lose the benefit of all previous victories against the same claim of misconduct." *Johnson* v. *Ford Motor Co.*, 113 P.3d 82, 94-95 (Cal. 2005). This problem is not just hypothetical. In a significant majority of smoking-and-health cases that have gone to trial, juries have ruled in petitioner's favor. The impropriety of nonetheless allowing a single jury to punish petitioner as if it were legally liable to all potential plaintiffs in the state should be plain.

As a practical matter, moreover, the court that upholds the first large verdict has no way of ensuring that other juries and/or courts will adequately protect the defendant from excessive multiple punishment. The "pay now get credit (maybe) later" approach turns a blind eye to the practical reality that courts might be unwilling to limit a plaintiff's recovery simply because another plaintiff already received a punitive award. See *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967). On the other hand, depriving subsequent plaintiffs of the right to pursue punitive damages would trigger unseemly races to the courthouse.

This Court should grant certiorari to determine whether the Oregon Supreme Court is correct that punitive damages can be awarded as punishment for conduct that harmed non-parties, a question of pressing importance that is the subject of a conflict of authority.

C. The Lower Courts Require Guidance As To Implementation Of De Novo Review – An Issue That Arises In Every Punitive Damages Case.

Respondent's claim that the third question presented was not preserved is specious. Petitioner has argued at each level of appellate review that the practice of Oregon courts of deferring to assumed findings of fact by the jury is inconsistent with a court's constitutional duty to conduct its own independent review of the punitive damages award.[3]

Respondent's substantive responses fare no better. Her chief argument on this point is that Oregon should not be required to "abandon its respect for jury findings." Opp. 29,

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[3] *See* Respondent's Brief and Opening Brief on Cross Appeal at 52 ("After *Cooper Industries*[, *Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)], the rational juror standard or any similar standard appropriate for reviewing a finding of fact does not ensure constitutionally adequate review of a punitive damages award."); Petition for Review at 19-22 ("When read together, *BMW* and *Cooper Industries* indicate that the rational juror standard gives more deference to the jury's determination than the federal constitution permits."); Response to Petition for Review at 15 n 7 ("If defendant means to suggest that the appellate court reviews the *jury's decision* de novo, defendant is wrong."); Petition for a Writ of Certiorari at 14-15 ("Oregon's failure to exercise meaningful judicial oversight of punitive damage awards is compounded by an application of its overly lax standard of review to 'findings' that the jury did not make but that a court speculates a jury could have made."); Brief on Remand from the United States Supreme Court at 17 (arguing for a de novo standard of review, this time as required by *State Farm*).

27. What respondent seems to miss is that the jury made no specific findings that would bear on the *BMW* guideposts. See *Cooper Industries*, 532 U.S. at 437. A large award of punitive damages is like a Rorschach blot, from which many different meanings can be discerned. It makes no sense to infer from the size of the award findings that the jury did not make. See Pet. 24-26. Respondent offers no response to this argument. Nor does she address our discussion of *BMW*, *Cooper Industries*, and *State Farm*, each of which involved an independent review of the record.

Instead, she attempts to characterize the case with which the holding below conflicts – *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63 (Cal. 2005) – as a narrow decision in which the California Supreme Court ruled only that "the appellate court erred in presuming the size of the actual loss from the size of the punitive damages verdict." Opp. 27 n.9. But the decision in *Simon* was far broader: the court expressly stated that "[w]hile [courts must] defer to express jury findings supported by the evidence, in the absence of an express finding on the question [they] must independently decide" whether the fact at issue was established in the record. 113 P.3d at 72. That requirement of "independent" review stands in stark contrast to Oregon Supreme Court's repeated assertion that a court applying the *BMW* guideposts should "construe all facts in favor of the plaintiff, the party in whose favor the jury ruled." Pet. App. 23a, 2a. The California Supreme Court's procedure takes de novo review seriously, while the Oregon Supreme Court's approach is a rubber stamp. This Court should step in to resolve this important conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH S. GELLER
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN D. HACKER
(*Counsel of Record*)
LESLEY R. FARBY
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

QUESTIONS PRESENTED

This brief addresses the following questions presented in the petition for a writ of certiorari:

1. Whether due process allows a jury to punish a defendant for unadjudicated harm to individuals not before the court.

2. Whether, in reviewing a punitive damage award for excessiveness, an appellate court may assume as true any fact that arguably supports the award, even where the jury made no specific factual findings.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case. Letters of consent have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber is filing this brief in support of the petition for a writ of certiorari because the rational and equitable administration of punitive damages is a matter of profound concern to the Chamber's members. The Chamber's members welcomed this Court's decisions in *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003), which they viewed as providing much-needed guidance on the scope of conduct for which punitive damages may be imposed and the standard of review of punitive damages awards. Many state and lower federal courts, however, have failed to adhere to the principles set forth in those decisions and in earlier punitive damages cases de-

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the Chamber and its members, made a monetary contribution to the preparation and submission of this brief.

cided by this Court. The decision of the Oregon Supreme Court in this case is illustrative of the problem. The Chamber submits that this case is an ideal vehicle for bringing some measure of clarity to the chaos that continues to roil punitive damages jurisprudence in federal and state courts throughout the nation.

REASONS FOR GRANTING THE WRIT

Well before this Court began reviewing punitive damages awards for substantive excessiveness, the Court's punitive damages opinions "strongly emphasized the importance of the procedural component of the Due Process Clause." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994). These opinions expressed special concern with two procedural aspects of punitive damages awards. First, the Court recognized the problem of inadequately guided juries, which invites "extreme results that jar one's constitutional sensibilities." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). Absent sufficient guidance on how to determine appropriate punitive awards, juries can do "little more than . . . what they think is best," and are "left largely to themselves in making this important, and potentially devastating, decision." *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring). In particular, the failure to tether a jury's discretion closely to the proper function of punitive damages creates a grave risk that they "will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Oberg*, 512 U.S. at 432. Accordingly, this Court has long emphasized the importance of providing "adequate guidance" to jurors charged with the societal function of meting out civil punishment on behalf of the community. *Haslip*, 499 U.S. at 18; *see State Farm*, 538 U.S. at 418.

Second, this Court's punitive damages opinions have acknowledged from the outset the importance of meaningful judicial scrutiny of punitive damages awards. Its early opin-

ions "stressed the availability of both 'meaningful and adequate review by the trial court' and subsequent appellate review" as essential to the legal process that is due before punitive damages may be imposed. *Oberg*, 512 U.S. at 420 (quoting *Haslip*, 499 U.S. at 20); *see id.* at 421 ("Judicial review . . . has been a safeguard against excessive verdicts for as long as punitive damages have been awarded."). Meaningful judicial review is crucial, the Court explained, because *even where juries are given adequate guidance* through proper instructions, there remains "the possibility that a jury will not follow those instructions and . . . return a lawless, biased, or arbitrary verdict." *Oberg*, 512 U.S. at 433. Accordingly, this Court has held that due process requires "[e]xacting appellate review" of a punitive damages award, to ensure that the award "is based upon an application of law, rather than a decisionmaker's caprice." *State Farm*, 538 U.S. at 418 (internal quotation marks omitted); *see Cooper Indus.*, 532 U.S. at 436 (due process requires *de novo* review of trial court's application of substantive guideposts).

The petition in this case implicates both of the procedural due process issues created by "the imprecise manner in which punitive damages systems are administered" in this country. *State Farm*, 538 U.S. at 417. On the one hand, the trial court allowed the jury to consider evidence of unadjudicated harm to non-parties in deciding how much punitive damages to award respondent. Thus unmoored from the facts and conduct at issue in respondent's own case, the jury – quite predictably – awarded punitive damages in an amount out of all reasonable proportion to the harm inflicted on Mr. Williams.[2]

Then, on appeal, the Oregon Supreme Court not only re-

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[2] The punitive damages award of $79.5 million was almost 97 times the $821,485 the compensatory damages awarded by the jury for wrongful death, and 152 times the $521,485 statutory maximum for wrongful death damages applicable here.

fused to correct that error, it compounded the error by also refusing to conduct the meaningful review of the award compelled by due process and this Court's precedents. Rather than conducting a *de novo* review of the record to ensure that the $79.5 million award was consistent with constitutional limitations on the state's power to inflict punishment through civil jury awards, the Oregon Supreme Court reviewed the record as if the award were presumptively valid, assuming as true any fact adverse to petitioner that was arguably supported by the evidence, even though no facts at all were specifically found by the jury.

The punitive damages award ultimately affirmed in this case was, in short, the product of the jury's punishment for conduct not adjudicated and the appellate court's reliance on facts not found. If the "due process" to which petitioner was entitled means anything, it must bar the deprivation of property through a punitive damages award in a case like this. Unfortunately, however, the decision below does not stand alone – too many other courts are imposing and affirming punitive damages awards using similarly flawed trial and appellate procedures. Certiorari should be granted to clarify – and reinforce – the vitally important procedural standards that govern the administration of punitive damage awards in state and federal courts.

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT JURIES MAY NOT PUNISH DEFENDANTS FOR HARM TO NON-PARTIES

The Oregon Supreme Court in this case squarely held that a defendant may be punished not only for conduct that injured the plaintiff, but also for conduct that injured others not before the court. In the Oregon Supreme Court's words, the massive award was justified because "Philip Morris harmed a much broader class of Oregonians," Pet. App. 23a, and "the jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Mor-

ris was prepared to inflict on the smoking public at large," Pet. App. 18a.

The Oregon Supreme Court's holding that a punitive damages award may be based on unadjudicated harm to non-parties directly conflicts with this Court's admonition in *State Farm* that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423; *see id.* ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."). The decision below also conflicts with decisions of the Eighth Circuit, the California Supreme Court and several intermediate appellate courts holding that a punitive damages award may not be based on hypothetical harms to others not actually adjudicated by the court. *See Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004); *Johnson v. Ford Motor Co.*, 113 P.3d 82, 93 (Cal. 2005); Pet. 20 (citing other appellate court precedents).

Certiorari is warranted for the foregoing reasons, as the petition ably demonstrates. In this brief the Chamber seeks to emphasize the serious due process problems for defendants created by judicial decisions allowing the imposition of punitive damages for harm to non-parties. The approach endorsed by such decisions implicates two due process concerns in particular: it denies the defendant the right to mount a defense to non-parties' claims, and it risks multiple punishment for the same conduct. These due process concerns, both individually and together, amply justify review and reversal of the decision below.

A. Punishing A Defendant For Harm To Non-Parties Denies The Defendant Its Due Process Right To Defend Claims Against It

By permitting the jury to punish petitioner for harm to non-parties, the trial court allowed respondent's lawsuit to

become a vehicle for vindicating the rights of a "broader class of Oregonians" purportedly harmed by petitioner's conduct. Pet. App. 23a. In other words, the court effectively turned this individual case into a *de facto* class action, without the *de jure* procedural protections deemed essential to the fair deployment of the class action device.

The class action procedure allows the claim of a single plaintiff to represent the claims of hundreds or thousands or millions of other individuals only when the representative plaintiff's claim has so much in common with all the other claims that the defendant fairly can be made simultaneously liable (or absolved of liability) to all claimants in a single, all-or-nothing proceeding. The due process risk inherent in such a proceeding is self-evident: if the class representative's claim is not typical of the other claims or if the class members' claims differ materially among themselves, proceeding on a representative basis will almost certainly deny the defendant its right to mount a full and fair defense against each individual claim.

The very essence of "due process," of course, is the right to be heard before a judgment may be entered for or against a party. *See Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"). This includes the "opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972); *accord Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938). Accordingly, standard class action rules preclude class litigation on behalf of absent parties *unless* the plaintiff first proves

that all such parties are situated so similarly that litigation of one claim is effectively and fairly the litigation of all other claims as well.

It is impossible to contend that this case could have satisfied the requirements for proceeding as a class action, given that each claimant would be required to prove the extent of his or her personal reliance on various statements made by petitioner over the course of many years (most of which Mr. Williams himself never heard or was exposed to). Indeed, the courts have uniformly denied class certification in other tobacco-safety-misrepresentation cases for precisely that reason. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 492 (S.D. Ill. 1999); *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 599 (App. Div. 1998), *aff'd*, 698 N.Y.S.2d 615 (1999).

Respondent in this case nevertheless was effectively allowed to circumvent basic class action requirements – and the due process protections they are designed to provide – by proceeding with her case individually and then seeking punishment on behalf of what the Oregon Supreme Court referred to explicitly as a "broader *class* of Oregonians." Pet. App. 23a (emphasis added). That approach plainly denied petitioner any opportunity to challenge the existence, cause, or magnitude of any supposed injuries of the non-parties – overlooking the obvious possibility that many of the other ostensibly injured non-parties "may not have been able to establish specific elements – or that the defendant may have been able to establish unique affirmative defenses – related to their individual claims." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 601 (2003). Indeed, the non-parties were not even identified at trial, making it literally impossible for petitioner to defend against their claims, which thus remained purely hypothetical for purposes of assessing punitive damages. The

due process violation could hardly be more flagrant:

> If due process will not permit a defendant to be tagged with compensatory damages for the wrongs that it visited upon a large number of people without being afforded the opportunity to contest individual elements of each alleged victim's claim and to raise victim-specific affirmative defenses, it cannot tolerate the imposition of punitive damages in these circumstances, especially given that punitive damages for each wrong are expressly contingent upon an entitlement to compensatory damages. The defendant can be punished through the mechanism of punitive damages for the harm caused to third parties only if it committed legal wrongs against all of those parties. The only way to establish that it did so is through individual tort suits (or a collective proceeding in which the defendant is afforded the opportunity to defend against each allegation), not litigation in which the plaintiff effectively strips the defendant of all of its defenses.

Id. at 657.

In any other legal context, the suggestion that due process allows a person to be punished by a court for unproven, unadjudicated conduct affecting unidentified non-parties would be met with derision. This approach not only violates due process, it contradicts the most basic Anglo-American understanding of the *judicial* function, which is "intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 & n.10 (1974). The judicial function stands in "sharp contrast" to the *legislative* role, *id.*, which is to address the general welfare of the broader public. When individual courts and lay juries are called upon to issue broad, quasi-legislative pronouncements on matters they have not adjudicated – and could not rationally adjudicate in a single judicial proceeding – they are per-

forming a function they simply are not designed or equipped to handle. It should come as no surprise when such proceedings produce arbitrary and irrational results, as they so often do.

This case proves the point. The jury below, denied the guidance necessary to understand how it should limit a punitive award to address only the harm caused to Mr. Williams, issued an award that far exceeded any constitutionally reasonable amount for the conduct actually adjudicated in respondent's case. *See supra* note 2 (noting highly disproportionate ratio of punitive damages to compensatory damages); Pet. 1-2 (describing undisputed facts establishing that decedent was aware of risks associated with cigarette use). And unless the decision below is reviewed and reversed, it will *necessarily* lead to other such indefensible awards, as other plaintiffs' lawyers follow the decision's lead and invite juries to punish defendants for unproven, unadjudicated harms to non-parties. The excessive and irrational awards that will inevitably result will place greater strain not only on the defendants unfairly subjected to such awards, but also on the increasingly challenged capacity – and credibility – of the nation's civil justice system.

B. Punishment For Harm To Non-Parties Also Invites Unjust And Socially Wasteful Multiple Punishment

The *de facto* class action punitive damages award issued below not only stripped petitioner of its right to defend against non-parties' claims, it also subjects petitioner to the direct and substantial risk of being punished repeatedly for the exact same conduct causing the exact same harm to the exact same people. Although the award in this case was unambiguously intended to punish petitioner for harms it caused to non-parties, nothing prevents those non-parties from now bringing their own actions seeking duplicative punishment for the selfsame harm. Indeed, the massive size

of the award in this case all but guarantees that other potential claimants, for whose injuries petitioner was already punished, will file their own lawsuits seeking to collect their own payouts for the harms to a "broad[] class of Oregonians." Pet. App. 23a.

An essential function of a true, *de jure* class action is to ensure that, when a classwide proceeding is appropriate, a judgment for or against the defendant will preclude subsequent actions by class members seeking to establish the same liability. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985). The *de facto* class punishment imposed below affords no such protection. "Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff . . . deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure." *Williams*, 378 F.3d at 797. The law of *res judicata* also affords no protection, since it binds only persons who were actually parties to a prior judgment. *See Richards v. Jefferson County*, 517 U.S. 793, 800-02 (1996). In short, as Judge Friendly observed in his seminal opinion examining the multiple punishment risk posed by punitive damage awards based on harms to non-parties, there is "no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

Accordingly, petitioner faces the manifestly unjust prospect of being punished, over and over again, for the same harm to the same broad class of people, essentially guaranteeing that the final tally will far exceed the maximum amount that permissibly could be imposed for such harm in any one case. *See Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 51 (Tex. 1998) ("[I]f a single punitive damages award becomes unconstitutional when it can fairly be categorized as 'grossly excessive' in relation to a

state's legitimate interests in punishment and deterrence, it follows that the aggregate amount of multiple awards may also surpass a constitutional threshold.").

It is no comfort to defendants that some jurisdictions – including Oregon – allow future juries to consider the punishment already imposed against a defendant in determining the amount of punitive damages to award.[3] Such rules simply place a defendant in the untenable position of arguing that it should not be liable or punished for alleged wrongdoing while simultaneously introducing evidence that the same conduct caused a prior jury to award large punitive damages. Logic and experience tell us that evidence of a prior large award is unlikely to persuade a subsequent jury to issue a small award or no award. As Judge Friendly observed, "we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare." *Roginsky*, 378 F.2d at 840. Indeed, the more likely effect is the opposite: when a defendant introduces evidence that it has already been subject to punitive damages for the same course of conduct, a jury is almost certain to use the prior award as an "anchor" for its own award or as justification for imposing an even higher punitive damages award. *See* Cass R. Sunstein et al., *Punitive Damages: How Juries Decide* 216-19 (2002) (discussing empirical research demonstrating "anchor effects" in juries' punitive damages deliberation).

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[3] *See, e.g.*, Or. Rev. Stat. § 30.925(2)(g) (listing as one of many criteria for consideration in determining punitive damages award: "The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damages awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.").

The reality is that permitting a defendant to be punished for collective harm to non-litigants substantially increases the likelihood that corporate defendants will be subjected to repeated – and oxymoronic – "take all" lawsuits. And the opportunity to get future "credits" certainly is of no use to a defendant that *wins* subsequent cases brought against it. Similarly, even if a defendant were to prevail in the lion's share of individual cases brought against it (and therefore be punished for harms for which a later jury absolves the defendant), a single punitive award based on harm to others could essentially wipe out all of its previous or subsequent victories. This very case exemplifies that danger. Although petitioner has prevailed in numerous other lawsuits brought by individual smokers invoking theories similar to respondent's, this single verdict punishes petitioner for *all* such conduct in the State of Oregon. This approach allows a single (possibly aberrational) jury to impose state-wide sanctions against a corporate defendant for injuries that never need be proven in court. The fear of such an outcome distorts the legal process by placing "insurmountable pressure on defendants to settle . . . even when the probability of an adverse judgment is low." *Castano*, 84 F.3d at 746; *see In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995).

This inordinate pressure to settle has severe ramifications beyond the injustice to the defendant itself. As several prominent scholars have explained, exposing companies to multiple, massive punitive damages awards can result in overdeterrence, causing firms to take precautions that may be socially wasteful. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 882 (1998); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 322-27 (1998). When the risks attending the introduction of a product or service or business practice appear unacceptably high, the prudent actor stays out of the game – to society's detriment. Although all

litigation carries a risk of erroneous results, punishing an entire course of conduct on the basis of a single potentially wrongful decision inflates that risk unnecessarily, and increases the prospect that the defendant will be deterred from engaging in socially beneficial activities. *See* Colby, *supra*, at 612 n.98.

The multiple punishment problem created by the approach endorsed below is thus not only a due process problem – it is an economic and social problem of broad dimension. This Court should grant review to make clear that punitive damages may be awarded to punish the defendant only for harms *to the plaintiff*, and not for unadjudicated harms to non-parties.

C. Jury Instructions Of The Kind Rejected Here Are Necessary To Mitigate The Risks Of Punishing For Harm To Non-Parties

In every punitive damages case, "proper jury instruction is a well-established and, of course, important check against excessive awards." *Oberg*, 512 U.S. at 433. In the nuanced context of considering harm to non-parties, clear jury instructions are particularly important. As explained above, this Court in *State Farm* rejected the notion that juries may punish a defendant for harm to individuals not before the court. But the Court did not categorically bar all *consideration* of "other similar act" evidence; rather, the Court emphasized that such evidence might be relevant, but only to the extent it demonstrates the "deliberateness and culpability" of the defendant's conduct. *State Farm*, 538 U.S. at 422; *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 n.21 (1996). The distinction is critical, but there is no doubt that, absent clear guidance as to the proper role of such evidence, it is a distinction easily enough lost on lay juries, creating a serious risk that evidence will be misused in the punitive damages determination.

The specific danger is that evidence introduced ostensi-

bly to demonstrate the reprehensibility of the defendant's conduct toward the plaintiff will be used for the impermissible purpose of punishing the defendant directly for harm to parties not before the court. This danger is illustrated by *State Farm* itself. In that case, the plaintiffs had introduced evidence of State Farm's nationwide claims adjustment policy for the stated purpose of establishing State Farm's motive against its insured, the plaintiff in that case. 538 U.S. at 422. Notwithstanding the asserted purpose of such evidence, this Court found that the lower courts had used the "reprehensibility analysis" as a "guise" to punish the defendant for harm to non-parties. *Id.* at 423 ("Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells.").

State Farm thus exemplifies the need to maintain, during trial and jury deliberation, a clear distinction between permissible and impermissible uses of evidence of harm to non-parties. As the Court recognized in *State Farm*, "concerns over the imprecise manner in which punitive damages systems are administered" are "heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded." *Id.* at 417-18. This circumstance demands clear instructions "to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *Id.* at 418. And as the Court made clear, evidence of harm to non-parties has at best a limited bearing on basic punitive damages analysis. Such evidence may be relevant, for example, in a product liability case if it demonstrates the manufacturer's knowledge of a product's design defect.[4] Evidence of harm to others is *not*

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[4] In this context, evidence of the defendant's conduct *prior to* the specific conduct or transaction at issue may be relevant to the defendant's knowledge, while the defendant's actions subsequent to the conduct or transaction causing the plaintiff's injury would not bear on the defendant's knowledge. *See Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439,

relevant to assessing the scope of the harms for which the defendant may be punished, i.e., the harms suffered by the individual plaintiff in the case.

Even after *State Farm*, however, lower courts have continued to provide inadequate guidance to juries as to the permissible uses of evidence of harm to non-parties and have allowed them to punish defendants directly for such harms. *See, e.g., Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 606 (8th Cir. 2005) (Bye, J., concurring in the result) (calling into question trial court's refusal to provide jury instruction limiting consideration of harm to others where plaintiff had introduced evidence of widespread, nationwide deaths caused by smoking); *Henley v. Philip Morris, Inc.*, 9 Cal. Rptr. 3d 29, 72 (Ct. App. 2004), *cert. denied*, 544 U.S. 920 (2005) (allowing jury to punish defendant for plaintiff's claims which "rest on a quintessential 'mass tort,' i.e., a course of more-or-less uniform conduct *directed at the entire public* and maliciously injuring, through a system of interconnected devices, an entire category of persons to which plaintiff squarely belongs"); *see generally* Rachel M. Janutis, *Reforming Reprehensibility: The Continued Viability of Multiple Punitive Damages After* State Farm v. Campbell, 41 San Diego L. Rev. 1465 (2004) (collecting cases and observing that reprehensibility factor has been used to allow decisionmakers to increase amount of punitive damages awards based on harm to non-parties).

The rejected instruction in this case may not have *guar-*

451-52 (4th Cir. 2001) (eversing punitive damages award on the ground that post-design evidence does not demonstrate defendant's contemporaneous knowledge of wrongdoing); *Wohlwend v. Edwards*, 796 N.E.2d 781, 787 (Ind. Ct. App. 2003) (concluding that any relevance of defendant's subsequent acts was substantially outweighed by the danger that the jury would use this evidence to punish defendant for his subsequent acts instead of the conduct which gave rise to the plaintiffs' actual damages).

anteed that the jury punished petitioner only for the harms at issue in this case, but it would at least have provided the jury with a tool necessary to perform its task. Absent the instruction, an excessive award was essentially inevitable, as explained above, especially when coupled with counsel's argument urging the jury to impose broad punishment for unadjudicated harms to non-parties. And unless this Court grants review and explains – again – the need for such clarifying instructions, other excessive awards will be equally inevitable.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE APPROPRIATE STANDARD FOR REVIEWING THE TRIAL RECORD ON APPEAL OF A PUNITIVE DAMAGES AWARD

As noted above, in *Cooper Industries* and then again in *State Farm*, this Court emphasized the procedural due process significance of exacting, *de novo* appellate review of punitive damages awards. The Oregon Supreme Court in this case did not employ such a standard. Rather, relying on one of its own precedents that pre-dated *Cooper Industries* and *State Farm*, the Oregon Supreme Court deferred to "findings" it had no way of knowing whether the jury in fact made and reviewed the trial record searching for evidence to uphold the award. Many other courts have adopted a similar approach, while still others have adhered to this Court's precedents and engaged in a searching, independent review of the record in assessing the constitutionality of punitive damages awards. Pet. 23-26 (describing conflict among federal circuits and state high courts). This Court should grant review to resolve this conflict and reassert the importance of a truly *de novo* appellate review of punitive damages determinations.

The approach adopted by the Oregon Supreme Court, in reliance on its earlier decision, cannot be squared with *Cooper Industries* and *State Farm* or with the procedural due

process principle those decisions enforce. The earlier Oregon decision, *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001), treated a jury's punitive damages award as a factual finding as to the amount socially necessary to punish and deter the defendant's conduct. *Id.* at 485 ("the amount necessary to punish what has occurred and deter its repetition is a question for the jury"). Accordingly, the *Parrott* court held that the appellate court's only review function is to determine whether there is "evidence in the record to support" whatever facts the plaintiff claims justify the jury's award, and then to decide whether, on those facts, the award "violates the legal standard of gross excessiveness." *Id.*

That reasoning squarely conflicts with this Court's recognition that a punitive damages determination "does not constitute a finding of 'fact.'" *Cooper Indus.*, 532 U.S. at 437. As this Court explained, "[u]nlike the measure of actual damages, which presents a question of historical or predictive fact, the level of punitive damages is not really a fact tried by the jury," but rather an "expression of its moral condemnation." *Id.* at 432, 437 (internal citations omitted). For that reason, "the deterrent function of punitive damages" also is not "a 'fact' to be found by the jury" (*id.* at 438), contrary to *Parrott*'s explicit reasoning.[5]

Because a punitive damages award often simply reflects a jury's moral judgment about the socially appropriate level of retribution, it is impossible to identify what facts the jury found in issuing the award – or whether it found any facts at all other than the minimum required to establish underlying liability. There are, in other words, no discernible factual findings to which the appellate court can defer, even in the-

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[5] This Court made clear that reviewing courts should defer to *specific* findings of fact made by the jury via special interrogatories. *See Cooper Indus.*, 532 U.S. at 439 n.12 (Seventh Amendment would not permit reviewing court to disregard "specific findings of fact" made by the jury). There were no such findings here.

ory. By contrast, in reviewing a general-verdict liability determination, the appellate court can properly assume that the jury found the facts necessary to establish the elements of liability; the question on appeal will simply be whether there is substantial evidence to support those factual findings.

That approach cannot logically work for review of a general punitive damages verdict that is ultimately moral and non-factual. Nobody knows what facts the jury found (beyond those relevant to basic liability), nor does anybody know what facts the jury considered significant to the moral judgment its punitive damages verdict is supposed to represent. All the appellate court knows, beyond the award itself, is what the record shows. And in order to fulfill its duty to ensure that the award constitutes the "application of law" rather than of arbitrary moral factors such as "caprice" or disdain for big businesses, *State Farm*, 538 U.S. at 418, the appellate court cannot simply draw from that record hypothesized (and cherry-picked) facts the jury *could have found* simply to justify the award after the fact. Rather, the court must exercise its own independent judgment as to whether the record, viewed through the lens of the guideposts set forth in *Gore* and *State Farm*, legally justifies an award as high as the jury's award.

That is the approach this Court itself followed in *Gore*, *Cooper Industries*, and *State Farm*. *See* Pet. 26-27. And it is the only approach consistent with the Constitution's fundamental promise that property will be deprived only through *due process of law* – not the exercise of judicial imagination.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5337

JONATHAN D. HACKER
(*Counsel of Record*)
LESLEY R. FARBY
O'MELVENY & MYERS LLP
1625 EYE STREET, N.W.
WASHINGTON, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300

THEODORE J. BOUTROUS, JR.
Counsel of Record
THOMAS H. DUPREE, JR.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Amicus Curiae

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QUESTION PRESENTED

This case involves a $79.5 million punitive damage award to a single individual—the widow of a smoker—that is more than 97 times the jury's substantial award of compensatory damages. Although this Court held in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2003), that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"—and that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee"—the Oregon Supreme Court upheld the award in full, deeming Philip Morris's conduct so "reprehensible" as to "override" the constitutional mandate of proportionality.

Amicus will address the question whether the Oregon Supreme Court misapplied and effectively nullified the requirement that a punitive damage award be reasonable and proportionate to the compensatory damage award, in direct conflict with this Court's decisions in *State Farm* and *BMW v. Gore*, 517 U.S. 559 (1996), as well as the decisions of federal courts of appeal and other state courts of last resort.

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W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547 (2000) 6

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 133 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 725 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached in the Addendum.

The questions presented by this case are not unique to Philip Morris or the tobacco industry. Virtually all corporations are vulnerable to arbitrary and excessive punitive damage awards when juries are not given adequate instructions, and reviewing courts decline to enforce the due process guideposts that help ensure reasonableness and proportionality. Because plaintiffs routinely seek punitive damages in product liability cases, the fair administration of punitive

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, PLAC states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than PLAC or its counsel made a monetary contribution to the preparation or submission of this brief.

civil sanctions is an issue of great importance to product manufacturers, and PLAC has filed *amicus* briefs in this Court's three most recent decisions involving constitutional excessiveness challenges to punitive damage awards: *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

As set forth below, PLAC believes that the constitutional limitations on such awards should be faithfully enforced, including the requirement that the amount of any punitive damage award bear a reasonable and proportionate relationship to the amount of the compensatory damage award.

STATEMENT

This case reflects the confusion in the lower courts over the proper application of the ratio guidepost in punitive damage cases. Respondent Mayola Williams, the widow of a smoker, sued petitioner Philip Morris USA, asserting fraud and negligence claims in connection with the death of her husband from lung cancer. Petitioner's Appendix ("Pet. App.") at 1a. An Oregon jury awarded respondent $821,485 in compensatory damages—including $800,000 in non-economic damages—and $79.5 million in punitive damages. *Id.* at 9a.

Although the trial court remitted the punitive damage award as excessive under the federal constitutional guideposts, the Oregon Court of Appeals reinstated the award in full, 48 P.3d 824 (Or. Ct. App. 2002), and the Oregon Supreme Court denied review. 61 P.3d 938 (Or. 2002). This Court then granted certiorari, vacated the Court of Appeals' judgment, and remanded for reconsideration in light of *State Farm*. 540 U.S. 801 (2003). On remand, the Court of Appeals again held that the full award must be reinstated, notwithstanding the more rigorous *State Farm* standards. Pet. App. 35a.

The Oregon Supreme Court affirmed. The court acknowledged that the 97:1 ratio of punitive to compensatory damages exceeded the constitutional limits set forth in *State Farm*, stating that the ratio "substantially exceed[s] the single-digit ratio (9:1) that the Court has said ordinarily will apply in the usual case." Pet. App. 31a. Nonetheless, the court reasoned that Philip Morris's allegedly high level of reprehensibility sufficed to "overrid[e]" the ratio guidepost, explaining:

> Single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.

Pet. App. 33a. Construing "all facts in the light most favorable to plaintiff," the court concluded that "the jury's $79.5 million punitive damage award against Philip Morris comported with due process." *Id.* at 2a, 33a. The court also held that Philip Morris was not entitled to a jury instruction providing, in part, that "[t]he size of any punishment should bear a reasonable relationship to the harm caused to [respondent's husband] Jesse Williams by the defendant's punishable misconduct." *Id.* at 17a.

SUMMARY OF ARGUMENT

The principle of proportionality—that a civil sanction must be reasonable and proportionate to the harm committed by the defendant—has a long pedigree in American constitutional and common law. This principle is reflected and enshrined in this Court's punitive damages jurisprudence. In *State Farm*, the Court emphasized the importance of "ensur[ing] both reasonableness and proportionality" in assessing punitive damages, holding that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 538 U.S. at 426-28.

In the context of punitive damages, the proportionality requirement is given force through the ratio guidepost, which limits punitive damage awards a low multiple (or fraction) of the compensatory damage award in all but the most unusual cases. The ratio guidepost has particular importance in product liability cases, which can involve large awards of compensatory damages and where the jury is often asked to award punitive damages against the backdrop of a complex design decision, competing expert testimony, and a consumer who was injured in the course of using the product. In such circumstances, jurors may be swayed by bias or prejudice against large, out-of-state corporations and be tempted to reward a sympathetic plaintiff with a large award of punitive damages.

The decision below runs roughshod over the ratio guidepost, effectively rendering it a nullity. The Oregon Supreme Court's ratio analysis cannot be reconciled with this Court's decisions in *State Farm* and *Gore*, and directly conflicts with the approach followed by other courts.

Review is warranted to clarify the proper application of the ratio guidepost. The Oregon Supreme Court's holding that the ratio guidepost may be "overridden" any time a court concludes that the defendant acted with a high level of reprehensibility has no basis in this Court's punitive damages jurisprudence and, when coupled with the court's holding that the facts must be viewed in the light most favorable to the plaintiff, drains the due process guideposts of any constraining force. Review is further warranted to dispel the confusion surrounding *State Farm*'s holding that a 1:1 ratio may be the constitutional maximum in cases where the compensatory damages are "substantial," and that where, as here, a plaintiff recovers non-economic damages, a lower ratio is required. *See* 538 U.S. at 426. Finally, this Court should hold that juries must be instructed on the "reasonable relationship" requirement, just as it held in *State Farm* that juries must be instructed on the territorial limitations the Constitution places on punitive damage awards.

ARGUMENT

This Court has repeatedly recognized that "punitive damages pose an acute danger of arbitrary deprivation of property." *State Farm*, 538 U.S. at 416-17 (quotation omitted). Punitive damage claims raise the danger that juries "will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).

Because "'elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose,'" the Due Process Clause "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416-17 (quoting *Gore*, 517 U.S. at 562, 574). The Court has held that excessiveness should be determined by reference to three guideposts: (1) the reprehensibility of the defendant's conduct; (2) the ratio between punitive and actual or potential damages; and (3) the difference between the award and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418. "The[se] principles . . . must be implemented with care, to ensure both reasonableness and proportionality." *Id.* at 428.

Although the Oregon Supreme Court erred in applying all three constitutional guideposts in this case, its approach to the ratio requirement is particularly misguided and directly conflicts with this Court's decisions in *Gore* and *State Farm*, as well as decisions of federal courts of appeal and other state courts of last resort.

I. THE RATIO REQUIREMENT IS CRITICAL IN PRODUCTS CASES.

The principle that punitive damages "must bear a 'reasonable relationship' to compensatory damages has a long pedigree," dating back at least 700 years. *Gore*, 517 U.S. at 580-81. This Court has repeatedly "endorsed the proposition

that a comparison between the compensatory award and the punitive award is significant," *id.* at 581, most recently in *State Farm*, where the Court emphasized that, as a matter of due process, "courts *must* ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 538 U.S. at 426 (emphasis added). *See also United States v. Bajakajian*, 524 U.S. 321, 333 (1998) (criminal forfeiture violated the Excessive Fines Clause in part because there was no proportionality between the fine and the "harm caused" by the offending conduct).

The ratio guidepost is particularly important in product liability cases, where juries frequently award large amounts of compensatory damages—often containing a substantial non-economic component—so that even a 1:1 ratio can result in a severe sanction. *See, e.g., Buell-Wilson v. Ford Motor Co.*, No. GIC800836 (Cal. Super. Ct. Aug. 19, 2004) (upholding $75,000,000 in non-economic damages and a $75,000,000 punitive damage award even though the vehicle design complied with government safety standards and industry custom). Moreover, in many such cases the defendant's level of reprehensibility is low: the alleged defect is not readily apparent, and the claim involves a reasonable disagreement over a complex design judgment that the manufacturer made in good faith. Jurors in such cases are confronted with deciding whether a product creates "too much risk" in the context of individual cases involving tragic personal injuries, using hindsight, on the basis of a highly technical record and arcane and often conflicting opinion testimony from engineers and scientists. *See* Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 59 (1992); *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring).

As a result, jurors are not always well suited to make judgments concerning punitive damages in product liability cases. *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 586-90 (2000) (noting that jurors often demonstrate bias against companies that en-

gage in risk-safety balancing); Reid Hastie *et al.*, *Looking Backward in Punitive Judgments: 20-20 Vision?*, in Cass R. Sunstein *et al.*, *Punitive Damages: How Juries Decide* 96, 108 (2002) (concluding that "hindsight bias is almost inevitable when jurors make punitive damages decisions"). *See also* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 Colum. L. Rev. 1531, 1534 (1973) ("courts are not suited to the task of establishing specific product safety standards in the course of applying general reasonableness tests to determine the adequacy of allegedly defective products"); James A. Henderson, Jr., *Design Defect Litigation Revisited*, 61 Cornell L. Rev. 541 (1976).

The result is that product liability cases pose great danger that juries will "use their verdicts to express biases against big businesses," *Oberg*, 512 U.S. at 432. Faithful application of the ratio guidepost helps ensure that any award of punitive damages is reasonable and proportionate to the harm to the plaintiff.

II. THE DECISION BELOW CIRCUMVENTS THE CONSTITUTIONAL LIMITS ON PUNITIVE DAMAGES AND WORSENS THE CONFUSION IN THE LOWER COURTS.

The petition in this case ably sets forth the reasons why guidance from this Court is needed. This brief focuses more narrowly on several specific ways in which the Oregon Supreme Court misapplied the ratio requirement, in direct conflict with decisions from this and other courts.

A. Review Is Warranted To Clarify That A Finding Of Reprehensibility Cannot "Override" The Constitutionally-Mandated Ratio Requirement.

Under the Oregon Supreme Court's approach, a court need only pronounce conduct to be highly reprehensible and *any* punitive damage award may be upheld—even those that are grossly disproportionate to the compensatory damage

award. By holding that the "extraordinarily reprehensible" behavior of the defendant, Pet. App. 33a, and the "extreme and outrageous circumstances" of the case, *id.*, can "override" the ratio requirement and save from unconstitutionality a punitive damage award 97 times the amount of compensatory damages awarded, the decision below effectively nullifies the constitutional requirement of proportionality enshrined in the Due Process Clause and reflected in *State Farm* and *Gore*. *See* Pet. for Cert. at 8-14.[2]

This Court has never suggested that the three due process guideposts are independent factors in the sense that one may offset or trump another. Rather, each guidepost operates separately to cabin a punitive damage award to a constitutionally acceptable level that reflects fair notice of the severity of the penalty that may be imposed. Consequently, although reprehensibility may move the acceptable ratio within the established range of proportional damages, it does not render the ratio guidepost inapplicable, as the court below held. The Oregon Supreme Court's approach—allowing the reprehensibility guidepost to trump considerations of ratio—conflicts with *Gore* and with *State Farm*'s mandate that "courts *must* ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426 (emphasis added).

As Justice Breyer explained in his concurrence in *Gore*, assessing the "reprehensibility" of a defendant's conduct

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[2] As the petition explains, the wildly disproportionate award was the result of the trial court's authorizing the jury to punish Philip Morris for alleged harms suffered by non-parties. *See* Pet. for Cert. at 14-22. *State Farm*, however, squarely rejected this approach, explaining that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423. That is because "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Id.*

"provides little guidance on how to relate culpability to the size of an award." 517 U.S. at 590. Focusing on reprehensibility and disregarding ratio, as the Oregon Supreme Court did in this case, thus renders an excessiveness inquiry a largely subjective exercise, particularly given that some courts "make 'reprehensibility' a concept without constraining force." *Id.* Moreover, by concluding that the ratio guidepost may be overridden in "high reprehensibility" cases, the Oregon Supreme Court held it inapplicable in precisely those cases where the objective, constraining force of ratio analysis is *most* necessary: those where the facts present a particular danger that the jury may be swayed by bias or prejudice, or otherwise be tempted to return a grossly excessive and unconstitutional award.[3]

The Oregon Supreme Court's approach jettisons one of the most fundamental tenets of common law and constitutional jurisprudence: the basic retributive requirement of proportionality between punishments and wrongs. This Court has long recognized this principle in a variety of contexts. *See, e.g., United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The amount of the [punishment] must bear some relationship to the gravity of the offense that it is designed to punish."); *Weems v. United States*, 217 U.S. 349, 366-67 (1910) (declaring it "a precept of the fundamental law" as well as "a precept of justice that punishment for crime should be graduated and proportioned to offense"). As the Court stated in *Solem v. Helm*, 463 U.S. 277, 284 (1983), "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."

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[3] In this regard, the Oregon Supreme Court's decision to "construe all facts in favor of plaintiff, the party in whose favor the jury ruled" for purposes of reviewing punitive damages, Pet. App. 23a, is particularly misguided. *See* Pet. for Cert. at 22-28. This approach permits a court, as the Oregon court did here, to defer to the plaintiff's version of events, deem the defendant to have engaged in "highly reprehensible" conduct based on that skewed depiction, and then declare the ratio guidepost inapplicable.

The Oregon Supreme Court's decision also conflicts with Ninth Circuit precedent establishing that reprehensibility *cannot* be used to override the ratio guidepost. In *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005), the court explained that this Court has provided "a rough framework for evaluating whether there is a reasonable relationship between the punitive damages award and the actual or likely harm associated with the wrongful conduct." In reducing a punitive damage award as grossly excessive and unconstitutional, the court recognized that the reprehensibility analysis operates within the limits set by the ratio guidepost. *See id.* (explaining that low ratio is appropriate "where there are significant economic damages and punitive damages are warranted," whereas a higher ratio may be appropriate "[i]n cases with significant economic damages and more egregious behavior" or "in cases where there are insignificant economic damages but the behavior was particularly egregious").

A recent decision from the California Court of Appeal mirrors the Oregon court's erroneous approach. In *Bullock v. Philip Morris USA, Inc.*, 2006 WL 1044161 (Apr. 21, 2006), the court upheld a 33 to 1 ratio in a case involving an undeniably "substantial" compensatory damage award of $850,000. The court held that "[a]lthough this ratio significantly exceeds single digits, we conclude that the extreme reprehensibility of Philip Morris's misconduct . . . justifies the greater ratio." *Id.* at *26. Relying on California Supreme Court precedent, the court concluded that "'extreme reprehensibility' is a special justification that can overcome the presumption against an award exceeding a single-digit ratio." *Id.* at *27 (citing *Simon v. San Paolo U.S. Holding Co.*, 35 Cal. 4th 1159, 1182-83 (2005)). The dissent argued that the majority had misapplied *State Farm* and the ratio guidepost, stating that "because [the plaintiff] received substantial compensatory damages, the ratio of punitive damages to compensatory damages may be no more than 9 to 1." *Bullock*, 2006 WL 1044161, at *30 (opinion of Kitching, J.).

Other courts have also adopted this misguided and incorrect approach. For example, the Texas Court of Appeals upheld a punitive damage award 20 times the amount of significant compensatory damages awarded for a trespass action. *Mission Res., Inc. v. Garza Energy Trust*, 166 S.W. 3d 301 (Tex. Ct. App. 2005). Acknowledging the magnitude of the ratio, the court nonetheless concluded that "[a]lthough the harm suffered by appellees may have been compensated by the jury's award of damages, the highly unlawful nature of [the defendant's] conduct (it being a breach of contract, an intentional tort, and felony theft) prevents this Court from concluding that the ratio 20 to 1 was grossly excessive." *Id.* at 319. Similarly, the Arkansas Court of Appeals upheld a punitive damages award more than 17 times the substantial compensatory damages awarded for a defamation claim, explaining that the "conduct by appellant . . . is such that a 17.6-to-1 ratio is not breathtaking." *Superior Fed. Bank v. Jones & Mackey Constr. Co.*, 2005 WL 3307074 (Ark. Ct. App. Dec. 7, 2005).

Review is warranted to resolve these conflicts and to correct the Oregon Supreme Court's misapplication of *Gore* and *State Farm*. In fact, since this Court reversed the Oregon Supreme Court in *Oberg* more than a decade ago, and held that the Fourteenth Amendment requires Oregon to provide judicial review of punitive damage awards for excessiveness, the Oregon Supreme Court has never reduced a punitive damage award as unconstitutionally excessive. *See Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 487-90 (Or. 2001) (applying *Gore*, but approving an 87:1 ratio in light of the defendant's "particularly egregious acts"); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 476 (Or. 1999) (affirming $4 million punitive damage award in product liability action); *Oberg v. Honda Motor Co., Ltd.*, 888 P.2d 8, 14 (Or. 1995) (on remand) (upholding ratio in excess of 5:1 in product liability action even where compensatory damages were more than $900,000). Indeed, even though this Court reversed the Oregon Supreme Court in *Oberg* and remanded for an exces-

siveness review, the lower court simply upheld its prior decision.

B. The Oregon Court's Approval Of A 97:1 Ratio Typifies The Confusion In The Lower Courts.

Although this Court has been "reluctant to identify concrete constitutional limits on the ratio," *State Farm*, 538 U.S. at 424, many lower courts have interpreted this reluctance as a license to approve wildly disproportionate ratios that bear little relation to the actual harm suffered by the plaintiff. The decision below epitomizes this approach and thus presents an excellent vehicle for this Court to clarify the proper application of the ratio guidepost and "'help[ ] to assure the uniform general treatment of similarly situated persons that is the essence of law itself.'" *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (quoting *Gore*, 517 U.S. at 587 (Breyer, J., concurring)).

1. By approving a 97:1 ratio, the decision below directly conflicts with *State Farm* and *Gore*. In *State Farm*, the Court held that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. The Court further recognized that in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), it had concluded "that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." 538 U.S. at 425. The Court also emphasized that it had "cited that 4-to-1 ratio again in *Gore*," and "further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Id.* (citing *Gore*, 517 U.S. at 581). Finally, the Court held that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

As the court below conceded, a 97:1 ratio is excessive and unconstitutional under this Court's precedents. (If the ratio is calculated using the statutorily-capped amount of compensatory damages, the ratio rises to 152:1.) As the Oregon Supreme Court frankly acknowledged: "Either way, the second *Gore* guidepost is not met. All arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the Court has said ordinarily will apply in the usual case." Pet. App. 31a.

Although *State Farm* did not categorically prohibit ratios exceeding 9:1, the Court made clear that such awards were reserved for a very limited class of cases. Ratios exceeding a single-digit value, the Court explained, *may* comport with due process where "'a particularly egregious act has resulted in only a small amount of economic damages'" or where "'the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine.'" 538 U.S. at 425 (quoting *Gore*, 517 U.S at 582). None of those circumstances is present in this case.

2. Guidance is also needed as to how the ratio guidepost should be applied in cases where, as here, the compensatory damage award is substantial. Many courts, including the court below, have either misapplied or outright ignored this Court's holding that where "compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425 (emphasis added). Indeed, whereas the court below quoted this language from *State Farm*, Pet. App. 30a, it proceeded to disregard it in its ratio analysis—even though a compensatory award of more than $800,000 is undeniably "substantial." *Cf. State Farm*, 538 U.S. at 429 (noting that a $1 million compensatory award is "substantial").

Here too, the Oregon court's incorrect approach mirrors the approach of other courts that have essentially jettisoned this aspect of *State Farm*. As the Ninth Circuit has declared, "*State Farm*'s 1:1 compensatory to punitive damages ratio is

not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014-15 (9th Cir. 2004). *See also McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003) (explaining that "a red flag goes up" only if the award exceeds a 9:1 ratio, and suggesting that any lower ratio "presumptively passes muster under the Due Process Clause"); *Jones v. Rent-A-Center, Inc.*, 281 F. Supp. 2d 1277, 1289 (D. Kan. 2003) (reasoning that *State Farm* "guides this court to conclude that . . . a single-digit ratio likely is constitutionally permissible").

This trend is especially apparent in several recent decisions involving products, a number of which (like this case) were vacated by this Court and remanded for reconsideration in light of *State Farm*. For example, in *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (Cal. Ct. App. 2003), another case GVR'd for reconsideration in light of *State Farm*, the California Court of Appeal held that a 5:1 ratio was appropriate in a defective design case, even though the compensatory damage awards of approximately $5 million were undeniably "substantial," and even though a significant portion of the compensatory awards reflected non-economic harm. The court made clear that it did not consider itself "strictly constrained by the single-digit multiplier set forth in *State Farm*," *id.* at 763, let alone by this Court's holding that a 1:1 ratio may be required where compensatory damages are substantial.

Similarly, in *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570 (Or. Ct. App. 2003), the plaintiff was injured when her fishbowl shattered. She sued the manufacturer, and was awarded $100,000 in compensatory damages and $1 million in punitive damages. Following a GVR from this Court, the Oregon court declined to reduce the award to a 1:1 ratio, but rather held that "the maximum constitutionally permissible award in this case is four times the compensatory damages for which defendant is responsible," *id.* at 576, and imposed a $400,000 sanction. Likewise in *Bocci v. Key Pharmaceuticals, Inc.*, 76 P.3d 669, *modified*, 79 P.3d 908 (Or. Ct. App.

2003), the court upheld a 7:1 ratio following a GVR from this Court.

The approach followed by the courts noted above conflicts with the approach followed by the Eighth Circuit. In *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005), the court held that even though it found the defendant's conduct "highly reprehensible," under *State Farm* a 1:1 ratio was the constitutional maximum given the substantial compensatory damage award of $4 million. The court explained that "[n]otwithstanding the absence of a simple formula or bright-line ratio, ... [f]actors that justify a higher ratio, such as the presence of an 'injury that is hard to detect' or a 'particularly egregious act [that] has resulted in only a small amount of economic damages,' are absent here." *Id.* at 603 (quoting *Gore*, 517 U.S. at 582). Similarly, in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004), the court explained that a "large compensatory award" of $600,000 "is a lot of money" and accordingly reduced the punitive damage award under *State Farm* to achieve a 1:1 ratio. *See also Ceimo v. Gen. Am. Life Ins. Co.*, 137 Fed. Appx. 968, 970 (9th Cir. 2005) (affirming remittitur to achieve approximate ratio of 1:1); *Clark v. Chrysler Corp.*, 436 F.3d 594, 613-14 (6th Cir. 2006) (Kennedy, J., concurring) (stating that "I believe that $235,629.13 is . . . a substantial compensatory award" and therefore that a 1:1 ratio is the constitutional maximum under *State Farm*).

This Court should grant review to confirm that the 1:1 ratio in cases where the compensatory damages are "substantial" is a meaningful limitation on punitive damage awards. Indeed, in many cases, even a 1:1 ratio can result in an excessive and unconstitutional sanction.

3. The Oregon court further misapplied *State Farm* in refusing to reduce the ratio based on the fact that more than 97 percent of the award was in non-economic damages. Pet. App. 29a (noting that "Plaintiff suffered relatively small economic damages for Williams's wrongful death—less than $25,000").

In *State Farm*, the Court held that a low ratio is warranted where, as here, the compensatory damage award contains a significant amount of non-economic damages. Observing that the compensatory award consisted of $1 million in emotional distress damages, the Court explained that:

> The compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the [plaintiffs] suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.

538 U.S. at 426 (citing Restatement (Second) of Torts § 908, Comment c, p. 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both")).

In this case, $800,000 of the jury's $821,485 compensatory award was in non-economic damages. Pet. App. 9a. Because these considerations were then duplicated in the punitive award, a lower ratio was required.

Other courts have adopted the Oregon court's incorrect approach to non-economic damages. For example, in the Utah Supreme Court's decision on remand in *State Farm* itself, the court held that the presence of non-economic damages actually required an *increase* in the punitive damage award. The court stated that it had "no difficulty concluding that conduct which causes $1 million of emotional distress and humiliation is markedly more egregious than conduct which results in $1 million of economic harm." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 418 (Utah 2004), *cert. denied*, 543 U.S. 874 (2004); *see also Buell-Wilson* (imposing $75,000,000 in compensatory d mages,

largely for non-economic harm, and $75,000,000 in punitive damages).

Non-economic damages are now plagued by the same problems as punitive damages, such as inadequate guidance to juries, lack of objective criteria against which to measure outcomes, and the general absence of principled bases for judicial review—all of which leads to radically varying and arbitrary awards. *See* Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of our Tort System*, 90 Va. L. Rev. 1401, 1417 (2004) ("without rational criteria or defined limits, the pain and suffering award becomes the same arbitrary deprivation of property as were punitive damage awards before" *State Farm* and *Gore*). Review is warranted for this reason as well.

4. Finally, the Oregon Supreme Court held that the trial court properly denied Philip Morris's request for a "reasonable relationship" instruction on punitive damages. The proposed instruction stated, in relevant part, that "[t]he size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct." Pet. App. 17a.

The proposed instruction was undeniably a correct statement of law. *See State Farm*, 538 U.S. at 426; *Gore*, 517 U.S. at 581. Moreover, such an instruction would help cabin a jury's determination of punitive damages and reduce the likelihood of the jury returning a grossly excessive and unconstitutional award. *See Haslip*, 499 U.S. at 19 (citation omitted) (warning that "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities"). In *State Farm*, this Court held that juries must be instructed on the constitutionally-imposed *territorial* limitations on punitive damage awards, explaining that "[a] jury *must* be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422 (emphasis added). This Court should grant review and hold that juries must be

instructed on the constitutionally-imposed "reasonable relationship" limitation as well.

The Oregon Supreme Court's ruling on this issue conflicts with the approach followed by the Fourth Circuit. In *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1415, 1418 (4th Cir. 1992) (en banc), the court held Virginia's punitive damage charge unconstitutional because the jury was not required to be instructed that punitive damages must be proportional to compensatory damages. *See also Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-10 (4th Cir. 1991) (jury imposing punitive damages under South Carolina law must be instructed that "any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused").

CONCLUSION

As the decision below vividly demonstrates, the lower courts are confused over how to apply the ratio guidepost. This case presents an excellent vehicle for resolving these important and recurring questions.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300

THEODORE J. BOUTROUS, JR.
Counsel of Record
THOMAS H. DUPREE, JR.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Amicus Curiae

May 1, 2006

ADDENDUM

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL

3M
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc
Briggs & Stratton Corporation
Bristol-Myers Squibb Company
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
Deere & Company

The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company

Magna International Inc.
Masco Corporation
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Merck & Co., Inc. Office of General Counsel
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.

St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
Thomas Built Buses, Inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
Tyson Foods, Inc.
UST (U.S. Tobacco)
Vermeer Manufacturing Company
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

Supreme Court, U.S.
FILED
JUL 28 2006
OFFICE OF THE CLERK

No. 05-1256

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

JOINT APPENDIX

ANDREW L. FREY
Counsel of Record
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Petitioner

ROBERT S. PECK
Counsel of Record
Center for Constitutional Litigation, P.C.
1050 31st Street, NW
Washington, DC 20007
(202) 944-2803

Counsel for Respondent

PETITION FOR CERTIORARI FILED MARCH 30, 2006
CERTIORARI GRANTED MAY 30, 2006

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CIRCUIT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH

No. 970503957

Joann Williams-Branch, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Plaintiff,

v.

RJ Reynolds Tobacco Company, *et al.*,

Defendants

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
5/21/97	1	COMPLAINT filed by plaintiff in Multnomah Circuit Court.
9/26/97	9	COMPLAINT AMENDED, adding defendant Phillip Morris Inc.
11/16/98	70	Plaintiff's MOTION TO AMEND COMPLAINT to add Punitive Damages is filed.
2/17/99	134	FOURTH AMENDED COMPLAINT filed by plaintiff.
21/19/99	135	ANSWER TO FOURTH AMENDED COMPLAINT filed by defendant.
3/26/99	149	Defendant files proposed JURY INSTRUCTIONS.
4/1/99	185/186	Verdict in trial in favor of the plaintiff, awarding punitive damages on fraud claim and no punitive damages on negligence claim.

DATE	#	DOCKET ENTRY
4/19/99	191	Defendant Phillip Morris Inc. files MOTION for reduction of Punitive Damages Award.
5/24/99	199	Defendant Phillip Morris Inc. files MOTION for new trial.
5/20/99	201	JUDGMENT of the Multnomah Circuit Court filed.
6/03/99	208	ORDER on defendant's motion for reduction of punitive damages; granted in part reduced to $32 million.
6/22/99	213	ORDER denying defendant's motion for new trial.
6/22/99	214	NOTICE of entry of judgment.

OREGON COURT OF APPEALS

No. A106791

Mayola Williams, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Plaintiff-Appellant,

Cross-Respondent,

v.

Phillip Morris Incorporated,

Defendant-Respondent,

Cross-Appellant,

and

RJ Reynolds Tobacco Co., *et al.*

Defendants

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
6/22/99	1	Notice of Appeal filed.
10/26/01	96	Oral Argument.
6/5/02	109	OPINION of Court of Appeals, re-instating full punitive damages and remanding to the Circuit Court.
11/17/03	149	ORDER received from United States Supreme Court Remanding case.
6/9/04	177	OPINION OF Court of Appeals, reinstating punitive damages and remanding to the Circuit Court.

SUPREME COURT OF OREGON

No. S49755

Mayola Williams, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Plaintiff, Respondent on Review,

v.

Phillip Morris Incorporated,

Defendant, Petitioner on Review,

and

RJ Reynolds Tobacco Co., *et al.*

Defendants.

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
9/11/02	1	Petition for review FILED.
12/24/02	17	Petition for review DENIED.
9/29/04	1	Petition for review FILED.
12/21/04	17	Petition for review ALLOWED.
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SUPREME COURT OF THE UNITED STATES

No. 02-1553

Phillip Morris USA Incorporated,

Petitioner,

v.

Mayola Williams, Personal Representative
of the Estate of Jesse D. Williams, Deceased,

Respondent.

RELEVANT DOCKET ENTRIES

DATE		DOCKET ENTRY
04/26/03		Petition for writ of certiorari filed.
10/06/03		Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF JESSE D. WILLIAMS, deceased,
by and through his personal representative,
JOANN WILLIAMS-BRANCH,

Plaintiff,

v.

PHILIP MORRIS INCORPORATED,

Defendant.

Case No. 9705-03957

FOURTH AMENDED COMPLAINT
(Product Liability,
Negligence and Deceit)

NOT SUBJECT TO
MANDATORY ARBITRATION

Plaintiff alleges:

GENERAL ALLEGATIONS
AND REMEDIES SOUGHT

1. Plaintiff, Joann Williams-Branch, is the duly appointed Personal Representative of the Estate of Jesse D. Williams, her father, who died March 17, 1997 aged 67 years. Plaintiff is one of decedent's six surviving children whose names and ages are: Glenn, age 43; Darlene, 42; Joann, 41; Jesse Jr., 39; Freda, 37; and [P.2] Calvin, 35, all of whom are beneficiaries of this action for wrongful death. The decedent's wife of 45 years, Mayola Williams, is also a beneficiary to this action for wrongful death.

2. Jesse D. Williams died from poorly differentiated adenoquamous carcinoma causing cardiopulmonary arrest, which was caused by tobacco smoke due to his long term addiction to smoking Marlboro brand cigarettes. Decedent

smoked Marlboro cigarettes from in or about 1955 until in or about 1997.

3. Decedent Jesse D. Williams was 67 years old at the time of his death. He had retired from the Portland Public School District in 1991, but continued to maintain his own business, which he had operated for 20 years, until March 1997, when he was no longer able to work due to his illness. He married Mayola Williams on December 24, 1952, and lived in Portland, Oregon. At the time of decedent's death, Mayola Williams was 64 years old.

4. As a further result of the conduct of defendants which caused the death of Jesse D. Williams, he and his estate have incurred economic damages for medical expenses in the amount of $20,801.80, and funeral expenses in the approximate amount of $684.

5. As a result of the wrongful death of Jesse D. Williams, decedent's children have been deprived of the companionship, society, support, love, affection, guidance, and parenting, of their beloved [P. 3] father for the remainder of their lives; Mayola Williams has been deprived of the companionship, society, support, love, affection, guidance; coparenting, and consortium, of her beloved husband for the remainder of her life; and the Estate of Jesse D. Williams has suffered additional damages for his fear and mental, emotional and physical pain and suffering from the onset of the symptoms of his lung cancer in or about October 1996, until his death on March 17, 1997, all of which entitle the estate to reasonable compensation for non-economic damages in the amount of $1,000,000.

FIRST CLAIM FOR RELIEF — PRODUCTS LIABILITY

6. Plaintiff incorporates the allegations of paragraphs 1 through 5 above.

7. At all times from approximately 1954 until the present, defendant Philip Morris, Inc. designed, distributed, marketed, advertised and supplied the Marlboro brand cigarettes which caused Jesse D. Williams' disease and death.

8. At all material times, the cigarettes produced and distributed by defendant tobacco company were of defective design, unreasonably dangerous, and dangerous beyond the reasonable expectations of ordinary consumers in one or more of the following respects:

a. Defendant had added ammonia to increase the effects of nicotine; [P. 4]

b. Defendant had altered the pH of cigarettes or cigarette smoke so as to increase the effect of nicotine;

c. Defendant had controlled and manipulated the amount of nicotine in its cigarettes in such a way as to maintain the physical dependence of plaintiff and other smokers on its cigarettes; and

d. Defendant added sugars to its cigarette tobacco so as to increase the effect of nicotine.

9. Defendant Philip Morris Incorporated has shown a reckless and outrageous indifference to a highly unreasonable risk of harm, and has acted with a conscious indifference to the health, safety and welfare of others. Defendant Philip Morris Incorporated has exploited the inability of smokers to stop smoking, used nicotine to keep smokers smoking, exploited the psychological needs of the young and relied on them as replacement smokers for those who die because of the adverse health effects of its cigarettes. The effects of defendant's products are widespread and deadly, and defendant has known this for many years. Defendant has deceived the public concerning the health dangers of cigarettes and the addictive properties of nicotine. Defendant has derived enormous profits from the sales of cigarettes. Defendant is

liable for punitive damages in the amount of $100 million. [P. 5]

SECOND CLAIM FOR RELIEF — NEGLIGENCE

10. Plaintiff incorporates the allegations of paragraphs 1 through 9 above

11. The conduct of defendant tobacco company in designing, testing, controlling, processing, manufacturing, assembling, distributing, and supplying, the Marlboro brand of cigarettes, was negligent in one or more of the following ways:

a. In avoiding testing of tobacco, tobacco smoke, and cigarettes that would be likely to relate human disease to smoking;

b. In processing, controlling and manipulating the contents and proportions of various substances in cigarettes in such a way as to continue and/or enhance the habit-forming and/or addictive effects of those products on users, specifically by

(1) adding ammonia to increase the effects of nicotine;

(2) altering the pH of cigarettes or cigarette smoke so as to increase the effect of nicotine;

(3) controlling and manipulating the amount of nicotine in its cigarettes in such a way as to maintain the physical dependence of plaintiff and other smokers on its cigarettes; and

(4) adding sugars to its cigarette tobacco so as to increase the effect of nicotine. [P. 6]

c. In selling and distributing cigarettes which it knew or should have known contained poisonous and carcinogenic substances capable of causing and likely to

cause numerous serious and fatal injuries and diseases, including but not limited to cancer of the lungs;

d. In selling and distributing products which it knew or should have known contained habit-forming and addictive substances capable of and likely to induce irresistible habits and/or physical and psychological dependence and addiction when used in a foreseeable manner; and

e. In failing to manufacture and sell cigarettes without the characteristics described in c. and d. above, thus depriving Jesse Williams of the opportunity to smoke a safer cigarette.

The failures to test described in subparagraph a. above were part of defendant's plan to claim ignorance concerning the relationship between cigarette smoking and health.

THIRD CLAIM FOR RELIEF — DECEIT

12. Plaintiff incorporates the allegations of paragraphs 1 through 9 above.

13. Defendant tobacco company recklessly and/or intentionally made fraudulent misrepresentations about its Marlboro tobacco products, including deceitful statements about adverse health effects, the addictive nature of its tobacco products, and their contents. [P. 7]

14. Defendant tobacco company engaged in an ongoing public relations effort beginning in the early 1950s, outside its advertising and promotion activities, designed to manipulate public opinion by creating doubt about the adverse health effects of smoking without actually denying them, and to provide rationalizations to help smokers keep smoking in spite of the adverse health effects. Many of these activities were carried out by the Tobacco Industry Research Council, Council on Tobacco Research, and Tobacco Institute, of which defendant was a member. Defendant's statements were

intended to and did cause cigarette smokers such as plaintiff's decedent to continue smoking their cigarettes in spite of their adverse health effects.

15. Decedent did not know defendant tobacco company's representations were false. Decedent reasonably relied on, and suffered and died as a result of defendant tobacco company's misrepresentations.

16. Defendant tobacco company's deceitful statements comprised a campaign beginning in the early 1950s and consisting, among other things, of the following misrepresentations and similar misrepresentations:

a. That defendant accepted "an interest in people's health as a basic responsibility, paramount to every other consideration in our business" in its 1954 "Frank [P. 8] Statement" published in 448 newspapers with circulation of over 43 million in 258 cities in the United States;

b. That there is "no proof" that cigarette smoking is a cause of lung cancer or other human disease, in the 1954 "Frank Statement";

c. In a 1954 statement by Parker McComas, CEO of Philip Morris, that "if the industry leaders really believed that cigarettes caused cancer, they would stop making them";

d. In a 1962 statement by Philip Morris President Joseph Cullman to the Philip Morris annual stockholders meeting that, if there were a connection between cigarette smoking and human disease, defendant would not be in the business of making and selling cigarettes;

e. In a 1963 statement by Philip Morris executive assistant James Bowling to Thomas Whiteside of the New Yorker that the tobacco companies "believe there is

no connection or we wouldn't be in the business"; and at other times;

f. That the causal link between cigarette smoking and human disease was in doubt or "had not been proven" in repeated statements during the past 50 years;

g. That defendant always had and always would cooperate closely with "those whose task it is to safeguard the public health," in the 1954 Frank Statement and in similar statements since;

h. That cigarettes are not addictive, as in April 14, 1994 statements at Congressional hearings. [P. 9]

WHEREFORE, plaintiff prays for judgment in favor of the Estate of Jesse D. Williams against defendants, and each of them, in the amount of $26,485.80 for economic damages, and the further amount of $1,000,000 for non-economic damages, and the further amount of $100 million for punitive damages against defendant Philip Morris Incorporated, and for its costs and disbursements incurred herein.

CERTIFICATION TO COURT

The undersigned attorneys certify upon reasonable knowledge, information and belief, formed after making of such inquiry as is reasonable under the circumstances, that this document is not presented for any improper purpose, and that the legal positions contained herein are warranted by nonfrivolous application or modification of existing law, and that the undersigned reasonably believe that every and all allegations will be supported by evidence after further investigation and discovery.

DATED this 17th day of February, 1999.

GAYLORD & EYERMAN, P.C.

William A. Gaylord, OSB# 73104
Of Attorneys for Plaintiff

SWANSON, THOMAS & COON

Raymond F. Thomas, OSB# 79416
Of Attorneys for Plaintiff

Trial Attorneys

Raymond F. Thomas, OSB# 79416
William A. Gaylord, OSB# 73104

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF JESSE D. WILLIAMS, deceased,
by and through his personal representative,
JOANN WILLIAMS-BRANCH

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED,

Defendant.

No. 9705-03957

ANSWER OF DEFENDANT PHILIP MORRIS INCORPORATED TO PLAINTIFF'S FOURTH AMENDED COMPLAINT

Defendant Philip Morris Incorporated ("Philip Morris") answers plaintiff's Fourth Amended Complaint ("Complaint") as follows:

1. Philip Morris admits that Joann Williams-Branch is the Personal Representative of the Estate of Jesse D. Williams and that Jesse D. Williams died on March 1, 1997. Philip Morris is without knowledge or information sufficient to form a belief as to [P. 2] the truth of the remaining allegations contained in Paragraph 1 of the Complaint, and therefore denies the same.

2. Philip Morris is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2 of the Complaint that Jesse D. Williams died from poorly differentiated adenosquamous carcinoma causing cardiopulmonary arrest or that he smoked Marlboro cigarettes from 1955 until 1997, and, therefore, denies the same. Philip Morris denies the remaining allegations contained in Paragraph 2 of the Complaint.

3. Philip Morris is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint, and therefore denies the same.

4. Philip Morris denies the allegations contained in Paragraph 4 of the Complaint.

5. Philip Morris denies the allegations contained in Paragraph 5 of the Complaint.

6. As to the allegations contained in Paragraph 6 of the Complaint, Philip Morris incorporates by reference its responses to Paragraphs 1 through 5 of the Complaint. [P. 3]

7. Philip Morris admits that it has designed, sold to distributors, marketed, and advertised Marlboro cigarettes from 1954 to the present. Philip Morris denies the remaining allegations contained in Paragraph 7 of the Complaint.

8. Philip Morris denies the allegations contained in Paragraph 8.

9. Philip Morris denies the allegations contained in Paragraph 9.

10. As to the allegations contained in Paragraph 10 of the Complaint, Philip Morris incorporates by reference its responses to Paragraphs 1 through 9 of the Complaint.

11. Philip Morris denies the allegations contained in Paragraph 11 of the Complaint.

12. As to the allegations contained in Paragraph 12 of the Complaint, Philip Morris incorporates by reference its responses to Paragraphs 1 through 9 of the Complaint.

13. Philip Morris denies the allegations contained in Paragraph 13 of the Complaint. [P. 4]

14. Philip Morris denies the allegations contained in Paragraph 14 of the Complaint.

15. Philip Morris denies the allegations contained in Paragraph 15 of the Complaint.

16. Philip Morris denies the allegations contained in Paragraph 16 of the Complaint.

DEFENSES

First Defense

Plaintiff's Complaint fails to state ultimate facts sufficient to constitute a claim for relief against Philip Morris upon which relief can be granted. ORCP 21A(8).

Second Defense

Plaintiff's claims against Philip Morris are preempted and barred by the operation of the Supremacy Clause of the Constitution of the United States and the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. §§ 1331 *et seq.*

Third Defense

Plaintiff's claims against Philip Morris are barred, in whole or in part, by the applicable statutes of limitations and/or repose. [P. 5]

Fourth Defense

Plaintiff's claims against Philip Morris are barred because the characteristics of Philip Morris' cigarettes alleged in plaintiff's Complaint to constitute defects were open and obvious.

Fifth Defense

Plaintiff's claims are barred, in whole or in part, by the comparative negligence or fault of decedent in one of more of the following particulars:

1. Decedent chose not to follow warnings regarding the health risks of smoking and advisory statements regarding the benefits of quitting.

2. Decedent chose not to quit smoking.

3. Decedent failed to seek medical or other professional assistance to quit smoking.

Sixth Defense

Plaintiff's claims are barred, in whole or in part, by Oregon's adoption of § 402A of the Restatement (Second) of Torts, Comment i.

Seventh Defense

If plaintiff's decedent was injured or damaged, which injuries and damages are denied, the injuries and damages were caused solely by the acts of decedent himself or by preexisting conditions, other persons, entities, forces, and/or things of which Philip Morris had no control and for which Philip Morris is not responsible. [P. 6]

Eighth Defense

While denying at all times that any product manufactured by Philip Morris caused or contributed to the injuries and damages alleged by plaintiff in her complaint, Philip Morris avers that plaintiff and/or her decedent were warned or otherwise made aware of the alleged dangers of the product and further, that any such dangers, if they existed, were not beyond that which would have been contemplated by an ordinary consumer of the product. Plaintiff, therefore, is barred from any recovery on the claims asserted.

Ninth Defense

Plaintiff's claims are barred, in whole or in part, by the First Amendment to the United States Constitution and by the Constitution of Oregon Article I, § 8.

Tenth Defense

Plaintiff's claim for noneconomic damages is barred to the extent that it exceeds the $500,000.00 cap in ORS 18.560(1).

Eleventh Defense

Philip Morris hereby reserves its right to amend its Answer to assert other and related defenses as may become necessary.

DEMAND FOR JURY TRIAL

Defendant Philip Morris hereby demands trial by jury. [P. 7]

WHEREFORE, Philip Morris, having fully answered plaintiff's Complaint, prays for judgment in its favor.

DATED: February 19, 1999.

LINDSAY, HART, NEIL & WEIGLER, LLP

By /s/ John D. Kimmerlien
James L. Dumas, OSB #77167
John D. Kimmerlein, OSB #95537
Attorneys for Defendant
Philip Morris Incorporated

Shook, Hardy & Bacon, LLP
Walt Cofer
Billy R. Randles
John R. Fraser
Attorneys for Defendant
Philip Morris Incorporated

Trial Attorneys: Walter L. Cofer
Billy R. Randles
Patrick M. Sirridge
James L. Dumas

EXCERPTS OF RELEVANT TRIAL TESTIMONY AND ARGUMENTS IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

[Vol. 3-A] [Plaintiff's Opening Argument (Feb. 24, 1999)]

* * *

[Tr. 39] To this day, they choose to deny any and all responsibility for the massive harm caused to millions of people by their product, including Jesse Williams and his family, and to blame every bit of the lung cancer problem and the other health problems on those souls who chose to buy and use their products.

Now, to be sure, each smoker made choices, too. And Jesse Williams, through his family, accepts his share of that responsibility for which he's paid the ultimate price. But today, as we begin this trial, 100 percent of the burden of that choice is on the Williams' family, while Philip Morris escapes any responsibility.

Now, I would like to take you back into a little bit of history to see how this modern injustice came to pass so you can start to put the choices made by Philip Morris executives into historic perspective.

I think I'm going to display my limitations as an artist, but it will help me talk through this to just give you a little bit of an ongoing time line, and there's a time line behind here that we will talk about, but I'm going to give you just another one, a sketchy one

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[Vol. 3-B] [Plaintiff's Opening Argument (Feb. 24, 1999) (continued)]

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[Tr. 3] Plaintiff's Opening Statement

OPENING STATEMENT (Continuing)

BY MR. THOMAS:

Thank you, Judge. The air is moving.

This is my portion of the opening statement, and I am going to try to be done by 3:45, so I am going to move fast.

We talked about this case being about choices and about responsibilities. Let me say at the outset, Jesse Williams has made choices and his family accepts responsibility for those choices, and asks you to consider and compare the choices that Jesse Williams made with the choices that Philip Morris made.

And you know that the development of knowledge about tobacco was being played out in a big way. And the role that tobacco plays and has played in our lives before cigarettes came into existence goes way back.

I am going to show you a smaller time line, it's blank, and this is the time line of Jesse Williams' life. I want to introduce to you the testimony that we anticipate producing in relation to him, so you can know a little bit about who he is.

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[Tr. 14] who's in, no matter what the score is, "I got to take a smoke," and that was the course of this man's life.

I want to talk to you a little bit about the legal claims in this case, I know the defense is going to talk a little bit about that, and I just want to clarify a couple things.

First of all, there is not a claim in this case by the plaintiff, and we know the warnings changed, right, over the

years, there is not a claim in this case that these legal warnings were inadequate; and, therefore, we have a right to have a lawsuit against Philip Morris in this case. There is no claim about that. That's their defense.

Our claim is that what they did and what they actually put but into these cigarettes, and what they said, that's the basis of the claim: What they told the American public, what they did to the American public, Jesse Williams being a part of it, that's what creates the claim in this case.

Now there are some words for it, and we're going to hear more about this at the end, [Tr. 15] but in a couple of words, product liability defect, because what Philip Morris put into the cigarettes was different from what people expected.

People thought cigarettes have tobacco. What Philip Morris did was to create nicotine delivery systems that use chemical enhancement to make it so the kick from cigarettes was harder and that in the course of doing that, they created a higher market share for themselves to the point now where cigarettes sold by Philip Morris are almost half of the United States market, and Marlboros are over one-third of the cigarettes sold in the United States. And these things were beyond consumer expectations about what a cigarette is all about.

Second, what Philip Morris did was negligent. It was negligent; that they did not behave as a reasonable manufacturer would. Now, in regard to this, you can take into account what Jesse knew, what Jesse was told, and you can also take into account what Jesse — who Jesse was, and you can also take into account who Philip Morris is, and who had the broadest [Tr. 16] space of information.

There is going to be a war in this case in this courtroom about what did Jesse know. And you're going to have to go through it. Philip Morris has gone back to the school books

that he had about the dangers of tobacco or the bad things of tobacco from back in the 40s.

And on the other hand, the plaintiff was going to be presenting evidence from back then about how the weight of what people saw and the images of what people saw about cigarettes and tobacco created an altogether different image. It was glamorous.

The Marlboro man with the tattoo appealed to a guy coming back from the service who had just fought for his country. The Marlboro man was a person who had life that was full of adventure, and that Marlboro man image appealed to Jesse Williams and he stuck with it over the course of his life.

The actual medical causation in the case in the claim by the plaintiff is that the cigarettes that Jesse Williams smoked, from 1988 to when he died in 1997, were a substantial factor in causing his cancer. Now, this is an [Tr. 17] important point, not the only cause, but a substantial factor.

In other words, substantial means not insignificant. At the end of the case, the judge will give you a jury instruction called causation, and if you have questions about what does causation mean, how certain do we have to be that those cigarettes after 1988 caused Jesse Williams' cancer, that's the standard against which you will apply the evidence that you've learned and what you will hear from his treating doctors.

Now, I'm not talking about some doctors brought in by either side after this became a lawsuit. I mean the people who treated Jesse Williams because he was their patient. The testimony from these local physicians will be that those cigarettes were a substantial factor in causing his death. And in fact, Dr. Segal, who is his treating physician, testified and will testify and wrote in this letter, "Mr. Williams' lung cancer" — can you see it? "was almost certainly caused by ciga-

rette smoking. He smoked two packs a day for 45 years when his lung cancer was diagnosed, and he

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[Tr. 24] knew, and what responsibility did Philip Morris have for this based upon what they knew and what they said and what they did.

Now, I don't have much time, so I am going to give you a couple of legal concepts that I would at least like for you to have in the back of your minds. In regard to the product liability and the negligence claims, we said that we accept responsibility for what Jesse Williams did.

Does Philip Morris accept responsibility for that what they did? We're going to find out in a few minutes when Mr. Cofer talks to you, but it is anticipated from the denial of the allegations in the complaint that they're going to take an approach that goes like this.

One, it's not proven that cigarettes cause cancer. Two, cigarettes didn't cause this cancer. And three, even if cigarettes do cause cancer, Jesse Williams knew what he was doing. Now, you're going to have to think your way through that and make up your mind about who shares responsibility based upon what you've seen and what you will see about how this company has behaved from the beginning when it

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[Defendant's Opening Argument (Feb. 24, 1999)]

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[Tr. 46] can probably see that I have Williams' facts in red, and I have smoking and health facts in blue.

But as you heard, Mr. Williams was born in 1929 in Crockett, Texas. He lived, grew up and went to school there. June of 1948, he joined the Army, and it was some time in 1950, he was stationed in Korea and he began smoking.

Now, you heard reference to early tobacco ads. There will be no evidence that ads had anything to do when Mr. Williams began smoking. In fact, counsel conceded Mr. Williams began smoking because he was told that smoke would keep the mosquitoes off.

Sometime in the next year, Mr. Williams met Mrs. Williams, and I believe it was Christmas Eve of '52 that they were married, Mr. Williams was discharged from the service in June of 1953. Now, in her deposition, Ms. Williams testified that in the early years of their marriage, Mr. Williams smoked less than a pack a day.

Now, let's look how the evidence linking cigarette smoking to lung cancer was developing at the same time. The evidence that ties

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[Tr. 60] that Mrs. Williams used to urge her husband to quit smoking, telling him the cigarettes would kill him. His children told him the same thing.

Mr. Williams himself told his children not to smoke. He told them it was a bad habit and would rot their teeth. When he caught his son, Calvin, secretly smoking, he chased him on off the porch with a broom handle. When he caught his other two sons, he gave them a big lecture about it.

Mr. Williams himself used the words, "cancer sticks," in referring to his cigarettes. Other members of Mr. Williams' family used to try to get him to quit. His brother-in-law, Eddie, quit cold turkey in 1969, tried to encourage Mr. Williams to quit.

Both of Mr. Williams' sisters told him he should quit smoking. As I think Mr. Thomas told you, the family became particularly concerned in 1970 when Mr. Williams developed a strong cough, the family and his doctors attribute to cigarette smoking.

The Court will instruct you that under Oregon law a product is defective and unreasonably dangerous only, only, if it is more

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[Vol. 4-A] [Testimony of Neal Benowitz (Feb. 25, 1999)]

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[Tr. 84] Now, it turns out that all drugs of abuse work by releasing dopamine. So, you sort of stimulate an excessive amount of these pleasure centers that normally respond to other things. If something good happens to you or, you know, you're feeling great one day, you might have pleasure from your own chemicals.

But taking drugs artificially stimulates these pleasure centers. And —

Q. Is that one of the reasons why people take them?

A. Yes, that is one of the reasons why.

Also, there are very localized areas of the brain and very specific for release of dopamine which is common to all drugs of abuse. And if you block dopamine release you can, in animals, you can cause injury to the dopamine parts of the brain.

And in animals you might model drug abuse. You can teach animals to take cocaine, heroin or nicotine. If you block these dopamine areas in the brain, very small areas, the animals will not take the drugs anymore. So that is the really the key part of what the rewards are taking the drugs.

Now, there are other things nicotine [Tr. 85] does, as well. It causes hormones that cause stimulation, that cause arousal, that cause relaxation, that reduce stress, that reduce appetite.

So that when smokers take nicotine they can really manipulate or control their moods in a lot of ways. It helps them sort of become vigilant when they get up in the morning. Helps you concentrate, if you are tired. It can help you relax you if you have been stressed. It can help you not eat if you are trying to diet. There's a lot of different things that people use nicotine for.

And when you are smoking many cigarettes a day, you can really dose yourself with nicotine hundreds of times per day, and regular smokers come to rely on effects of nicotine to really control their moods and modulate their needs. When they need a lift, they smoke a cigarette. When they need to relax, they smoke a cigarette. And regular smokers get to depend on effects of nicotine to influence the activity of their own brain systems.

So that is sort of the first part of addiction.

Q. Is that the way that the human feels [Tr. 86] different when they take a drag off of a cigarette that the nicotine is changing in a chemical way their nerve function?

A. Yes.

Q. Is that what it's all about?

A. That is part of it.

Q. Okay.

A. So, part of it is that nicotine is doing things to modulate your mood. The second part has to do with the changes that occur when a person becomes a regular smoker.

Q. Okay.

A. And what happens when the brain gets stimulated in some way that is perceived as excessive, it tries to react to it to bring itself back to normal. And what develops is something called tolerance, which means you get an effect of a drug the first time. The second time you get less of an effect. The third time you get less of an effect. The body is trying to bring itself back to normal function. And it's well known that tolerance develops on a variety of drugs of abuse, including nicotine.

Now, when tolerance develops, it's

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[Tr. 89]A. They are. And it depends on several factors. One thing is that we know that different people have different genetic makeup of nicotine receptors and also dopamine receptors and different receptors in the brain.

So, we know there is a lot of differences from person to person in terms of what nicotine does for them. And that is why some people who try cigarettes and don't like them, don't find them rewarding, never become smokers. Some people try cigarettes and never stop smoking for the rest of their lives.

And then most people who become smokers try cigarettes, they become smokers. And, you know, a lot quit. Some don't. But there's a whole spectrum. A lot of that has to do with the brain structure genetics and also what people get from smoking.

Some hormones like serotonin is a hormone that gets released by nicotine that has a role in dealing with depression. Some of the drugs for depression work by increasing serotonin, as well.

Q. Is that like that Prozak drugs?

A. Like Prozak. And so some smokers, for example, find that when they smoke they feel less

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[Tr. 107] Q. All right. And we'll do that with a new page, before, but before we leave this one, this is a request for an expert opinion.

Does this chemical reaction and the way at that it feels to a smoker, a habituated smoker, and the absence when it is not happening, in other words, when the person isn't smoking, does that play a role in whether or not that person is more or less likely to be addicted to cigarettes?

A. Yes, I believe it does.

Q. And could you just describe that for the jury before we leave this chart, please?

A. Well, the concept of addiction means that you — that it's difficult to be without a drug. It causes disruption in how you feel, how you function without the drug. And when you are a regular smoker and your brain is used to nicotine, and your receptors have changed and your brain function has changed, you need nicotine to feel normal, and if you don't have it, you feel bad, you get irritable, you get grumpy, you fight with people, you can't concentrate, you can't do your job, a bunch of you can't sleep well. Different people have different symptoms. But it's common that people just don't feel well when they quit

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[Vol. 4-B] [Testimony of Neal Benowitz (Feb. 25, 1999)]

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[Tr. 15] A. Well, more nicotine exposure means a potential for greater addiction; and, in fact, for our data that I reviewed for and are published in the Surgeon General's Report on ethnic differences that suggests that addiction is more severe in black smokers and black men in particular than white men.

Q. And does that have to do with the success in quit rates?

A. Yes. For the same number of quit rates, black men are less successful at quitting than white men who smoke the same number of cigarettes.

Q. Let me interrupt you because I just kind of passed over that. Does quit rate have to do with the rate or number of persons in a particular category in terms of their success relative to persons in a different category?

A. Yes. If you look at a certain number of smokers, one question is how many quit, but if you are looking at the question of dependence or addiction, you need to know how many have tried to quit as well, and so studies have looked at both issues. Interest in quitting, the number of quit attempts and successful quit attempts, and with [Tr. 16] the same interest in quitting and same number of quit attempts, black men are less successful than white men.

Q. Are you aware that in this case, Jesse Williams tried a number of times, but was unsuccessful ultimately in quitting smoking cigarettes before he died?

A. Yes, I am.

Q. Well, I would like to just go then into the question of quitting. We have had some reference to, I think the number was to 50 million Americans had quit smoking cigarettes.

Are there a number of people who have tried and been successful in quitting smoking?

A. Yes.

Q. Is that figure about right?

A. Yes. I am not sure it's exactly 50 million. It might be 45 million, or 50, but a fair number of smokers have quit smoking successfully.

Q. From the standpoint of your studies, what observations have you made about — now I would like to go broader than the study of African Americans — about people's ability to quit smoking once they decide to try?

[Tr. 17] A. One of the striking things that everyone had found is the variability of that. We know some things predict easier quitting: People who smoke fewer cigarettes, people who have been smoking cigarettes for fewer years. There are other calculations, other predictors; but we know on average, it's difficult for smokers to quit, so the average smoker even though the average smoker who quits tries — makes serious quit attempts at least four or five times before they succeed, and it takes them many years, so it is not an easy thing for most smokers to do. Now, some people are lucky, some smokers are lucky and they're able to quit on the first try. Some smokers try over and over and over again and can never successfully quit, so there is a big spectrum of variation. And that's true for all drugs of addiction. There are some people who occasionally use cocaine at parties and never use too much of it, and never seem to get into trouble, and other people, once they start using cocaine, cannot control it and have severe health problems from it, and the same thing is true with alcohol.

There is variation in addiction

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[Tr. 19] were not widely publicized as they were later and have been smoking for years and years, have you worked with them in their efforts to quit?

A. Yes.

Q. In terms of the physiological and psychological results that occur during the quitting process, could you tell us about some of the things that they encounter?

A. Well, they're different problems different people have. Some of my patients have said, "I just feel lethargic, I have no energy. I just can't do my daily activities." Some people say, "I can't concentrate, I can't focus, I can't think straight." Some people say, "I just feel depressed and smoking makes me feel better," so there are different reasons. Some people can't really say why, they just say, "I can't quit. Whenever I quit, I just have this very intense urge to have a cigarette," and they really can't ever explain why, but they just can't do it. These are people who know very well the health risks of smoking, because every visit in our hospital we chart, "Are you a smoker or not?" And every time I see a person that's a [Tr. 20] smoker, I say, "You have to quit smoking because smoking is going to kill you. The best thing you can do for your health is quit smoking." Even after heart attacks, which you would think would shock people into quitting smoking, only about 50 percent of smokers are successful in quitting. So even though they know very well that smoking could cause another heart attack, half the people still smoke because they're highly addicted.

Q. In regard to Jesse Williams, were there any similarities in terms of his use of cigarettes with the patients who you treated in the clinical practice?

A. Yes.

Q. Could you describe generally for the jury what some of those similarities are.

A. Well, some of the characteristics of Jesse Williams are really those of a highly addicted smoker. He smoked for 45 or more years. He smoked from one to three packs of cigarettes per day. He smoked three packs of cigarettes a day for more than ten years.

And someone smoking three packs of cigarettes per day is smoking one cigarette every [Tr. 21] 15 to 20 minutes when you are awake. And since it takes about 7 to 8 minutes to smoke a cigarette, it means you're spending half of your waking hours with a cigarette lit smoking it. You can see a tremendous amount of one's life is taken up by smoking cigarettes.

One of the characteristics of addicted smokers is that when they wake up in the morning after sleep, they have a tremendous need for a cigarette, and one of the clinical questions that is used to access dependence is, "How long is it after you wake up in the morning do you have your first cigarette that day?"

And very addicted smokers had their first cigarette within minutes. He was one who had his first cigarette as soon as he woke up. In fact, when he woke up in the morning at 4:00 or 5:00 in the morning for some other reason, coughing or something like that, he would have a cigarette or two, even at 4 o'clock in the morning.

He was very much in the line of my highly dependent smokers who just — it's the first thing they do. Another thing that highly dependent smokers do is they plan to make sure they always have cigarettes available. [Tr. 22]

And again, the history of Jesse Williams indicates that he would make sure the night before he had cigarettes, and if he didn't have them for the next morning, he would go out a buy them to make sure there would always be cigarettes available. It was a very high priority thing to do.

My patients often have tried numerous times to quit. They'd use patches and gum. The same thing for Jesse Williams. He is reported to have tried to quit 20 or more times. He used patches and gum. He smoked even when he was using patches, so more nicotine than normal.

And when he couldn't smoke, he became irritable, he became angry, was hard to live with, and those are also characteristic features of my addictive smokers. When he started to get sick with bronchitis before his lung cancer, doctors told him to quit smoking and he did not quit smoking.

Another characteristic, even when there is a compelling health reason not to smoke, addictive smokers will often keep on smoking. His family was stated to have asked him over and over and over again to quit smoking many times; his [Tr. 23] wife and his children and all of them, and he was not able to quit.

These are all characteristics of highly addicted smokers which I have in my clinic with heart disease, and they keep on smoking, and this was shown by Jesse Williams.

Q. Thank you. Now, we talked about how nicotine affects the way that people think. Does it also affect the way people think about and by people, I mean the way the habituated or addicted smoker thinks about risk?

A. Well, when you are thinking about making a choice about a risky behavior, like smoking, any choice is determined by a lot of the factors on both sides. Choices are influenced by your experience, so a person on the side of wanting to quit would be influenced by health risks, by family pressures, by the cost of buying cigarettes, those are some of the main reasons that suggest why you should quit.

On the other side are factors such as the difficulty of quitting and how it is disruptive to your life. And when a smoker is deciding, a conscious thing to do as people are making decisions of what behaviors to engage in and what

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[Tr. 26] BY MR. THOMAS:

Q. Okay. I am going to try to resume. What does addiction do in regard to whether a person is going to be likely to go in the direction of additional thinking about the risk or in the direction of satisfying the need for the nicotine?

A. Well, one thing which addiction does, and this is true for tobacco and other drugs, is a person would like to find any excuse they have to keep on doing what's easier to do, which is not to quit smoking, and that will clearly influence your interpretation of things like warnings.

And cigarette warnings are a good example. They have actually been well studied. The first warning that which came out in 1966, said that, "Cigarette smoking may be hazardous to your health," and when smokers were interviewed, they often said, "Well, it says maybe. There is a lot of debate about it. Scientists are not sure."

Q. I just want to interrupt you because I can sense the tension here. Now, we're going to go into the question of the adequacy of the warning, but in terms of the direction of habituation and what it does to a

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[Tr. 51] younger smokers, doing things with their peers, but that's not what is driving them to smoking.

Q. I guess I would ask you the same, to your knowledge, has Philip Morris taken a public position that as the force of the symbolism that gets people to start subsides, the pharmacological effect takes over and that sustains the habit. Are you aware of that?

A. No. As far as I know, Philip Morris and other tobacco companies have really talked about nicotine as being for taste mostly with some mild psychoactivity, but never as sustaining smoking behavior.

MR. COFER: Excuse me. Your Honor, I would object to the portion with respect to other tobacco companies.

THE COURT: Let me use that jurors to remind you the lawsuit is against Philip Morris and not the smoking industry per se. There is going to be evidence you're going to hear about industry issues, and you may consider that as it relates to what Philip Morris knew or did as it acted.

But take care that when any witness talks about the industry, that you draw the [Tr. 52] distinction between the industry and Philip Morris particularly, which is the defendant in this case. Mr. Thomas.

MR. THOMAS: Yes, Judge.

BY MR. THOMAS:

Q. I'd like to go a little forward or closer in time, to 1972. And for the lawyers, that is the Exhibit 84, and I'm just going to show him the highlighted portion.

The 1972 document — again, I have to apologize for the quality, "Philip Morris USA, 1972," a memo from within the company. And I'm going to read it. I am not sure, I want to get it as big as I can without losing something.

"A widely-held theory holds that most people smoke for the narcotic effect, relaxing sedative that comes from the nicotine. The taste comes from the tar particulate in delivery. Although more people talk about taste, it is likely that greater numbers smoke for the narcotic value that comes from the nicotine."

Now in regard to taste and the narcotic effect, to your knowledge, has Philip Morris taken a position in a public forum, recognizing frankly [Tr. 53] that people smoke for the narcotic value that comes from nicotine?

A. No. Philip Morris has stated that the primary importance of nicotine is the taste of cigarettes.

Q. And there is an admission — I'm sorry, that is a legal word. There is a statement in here that the taste actually comes from the tar; is that right?

A. Well, there is some contribution of nicotine, but it is tar and nicotine is the taste.

Q. I'm going to move to Exhibit 86, and this is, again, from confidential document. "Motives and incentives in cigarette smoking." This is the William Dunn we discussed earlier?

A. Yes.

Q. "The majority of the conferees," and this is from a conference that they put together on a lovely little island lying about 150 miles east of the Virgin Islands.

"The majority of the conferees would go even further and accept the proposition that nicotine is the most active constituent of cigarette smoke. Without nicotine, the argument [Tr. 54] goes, there would be no smoking. And point one, no one has ever become a cigarette smoker by smoking cigarettes without nicotine."

Now, what does that have in terms of correlation with your own clinical experience, Doctor, in terms of why it is that people really become smokers?

A. It's what I have been explaining all morning, that the cigarette is a source of nicotine, and that's why people smoke cigarettes, for nicotine effects.

Q. And from the same conference, I'll try to get this as readable as possible. I don't know how well I can do. Follow along with me on that blown-up screen and see if it get it right.

"The cigarette is, in fact, among the most awe-inspiring examples of the ingenuity of man. Let me explain. The cigarette should be conceived, not as a product, but as a package.

The product is nicotine. The cigarette is but one of the many package layers."

Continuing. "Think of the cigarette pack as a storage container for a day's supply of nicotine. Think of the cigarette as a dispenser for a dose unit of nicotine. Think of the puff of

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[Tr. 56] I'd like to move up a little closer to the present and talk about what internal documents show about the concept of optimal cigarette nicotine deliveries. I am going to direct counsels' attention to Exhibit 139, just the highlighted parts. "Interoffice correspondence, Philip Morris USA, November 8, 1990, to C.K. Ellis." Now, do you know of anybody within Philip Morris called C.K. Ellis?

A. Yes. She, I believe, is the a vice-president for research.

Q. In fact, would it be possible that she is involved in world scientific affairs for Philip Morris?

A. I am not sure of her current title, by I do know she was a vice-president for research.

Q. All right. And in regard to a memo to her from three of their people, subject, and I can't say that, can you?

A. I'm not a French speaker, raison d'etre.

Q. And can you just tell us in English what that means, if you know what it means.

A. It's means the reason for being or why they're here.

[Tr. 57] THE COURT REPORTER: Would you spell that for me?

MR. THOMAS: R-a-i-s-o-n-d-'-e-t-r-e.

BY MR. THOMAS: Q. "On November 7th, 1990, you requested that we provide you with information about past,

present and future contributions of electro-physiological studies to PM USA." Now, can you just tell me generally what are electro-physiological studies?

A. Those are the studies involving brain waves that I talked before.

Q. EEG?

A. EEG studies looking at brain activity.

Q. And Paragraph 3 is the one that I am interested in. Quote, "We have shown that there are optimal cigarette nicotine deliveries for producing the most favorable physiological and behavioral responses.

Now, "optimal cigarette nicotine deliveries," what does this show that Philip Morris has apparently established scientifically within the company?

A. The question is, how much nicotine should be in a cigarette? It's clear that cigarettes can [Tr. 58] be manufactured with any amount of nicotine and the amount that a person gets is something that is of interest to manufacturers because they want to make sure there is enough nicotine in the cigarette.

There has been some concern about lower yield cigarettes that people think are less hazardous, but if you know nicotine is what keeps you smoking, you want to make sure there is enough nicotine in the cigarette to keep people smoking cigarettes.

Philip Morris is saying, "What is that level of nicotine that needs to be delivered to a smoker to have that cigarette be satisfying?" And that's really what this question is. It's really a pharmaceutical question. What is the minimal effective dose?

Q. And when we say optimal cigarette nicotine deliveries, optimal, are we talking about optimal nicotine deliveries for the health of a smoker here?

A. No.

Q. What is optimal?

A. We're talking about optimal, balancing out the desire to make cigarettes seem less

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[Tr. 61] A. Right. And delivery is not the same as nicotine content. The content is really, if you were to take all of the tobacco out of the cigarette and extract all the nicotine, how much is there.

Well, in fact, just to give you an example, a typical cigarette contains about, say, 12 to 15 milligrams of nicotine and that's the content. A smoker gets in one milligram and that's the delivery. Content is not decreased by 70 percent.

Q. So the cigarettes that they're selling to Jesse Williams between 1988, and when he died in 1997, in here the nicotine content may have been what it was in the '50s?

A. We don't have those numbers, but it is likely that that nicotine content has changed much, much less than nicotine delivery. It might not have changed at all, but we don't know, because we don't have those old cigarettes.

Q. Okay. And this is nicotine delivery, what comes out of the end?

A. Right.

Q. Is nicotine delivery measured by how much nicotine I could get out of this thing if I smoked [Tr. 62] it, or is it measured by how much is sucked out of the end of it by machine?

A. It is measured in a very standardized Basically, a smoking machine is a cigarette holder that's attached to a syringe that basically draws out smoke.

And it draws out 35 milliliters, which is about a little more than one ounce worth of smoke over exactly two seconds, and then it repeats that every 60 seconds until the cigarette is smoked down to a specified length above the filter over wrap or the paper that overlies the filter.

So that is the standard Federal Trade Commission test. That does not reflect how people smoke. People, in fact, take bigger puffs of them, they take puffs more frequently than every 60 seconds, about every 30 or 35 seconds, and there are also other things that people do when they smoke a cigarette that's different than a machine.

Q. I am going to ask you in a systematic fashion about that. I would like for you to assume that for purposes of nicotine delivery, when Philip Morris says they reduced it by 70 percent that that is correct and that's truthful. [Tr. 63]

We've already talked about what that means in regard to content. Let's talk about what Philip Morris has done in some of their brands to make it so that the nicotine delivery is lower for the smoke machine. Can you tell the jury about that.

A. Yes. There are several things that have been done. One of the things which was done is actually to make the cigarette paper burn faster, so that in given testing, if you puff every 60 seconds, but the paper is smoldering faster, then the smoking machine will take fewer puffs in a standardized test, and that has been shown.

Q. You mean the cigarette paper can be made so that it will burn faster which makes the cigarette burn faster?

A. The machine takes fewer puffs because it can only puff every 60 seconds.

Q. Okay.

A. A person can puff as fast as he or she wants, so a person can compensate for a faster burning cigarette by taking —

Q. More drags?

A. More drags, that's one thing. A second major things that has been — well, there is a [Tr. 64] filter which has an effect on nicotine. And the third thing which — this has been an important thing in the lower yield cigarettes, are ventilation holes.

These are little perforations in the filter, little holes, such that if you draw smoke from the end, like a smoke machine does, and you puff back and you put pressure on it, it will suck in fresh air and it dilutes the smoke.

Q. So that at the nicotine delivery end there is actually less nicotine coming out the end that goes into the smoking machine?

THE COURT: Excuse me.

A JUROR: Would you repeat that about the filter?

BY MR. THOMAS:

Q. Would you repeat that, please? Well, wait, wait, sorry.

THE COURT: That's fine. Don't mind me. It's all right, Mr. Thomas, go ahead.

BY MR. THOMAS:

Q. Okay. Would you repeat that, please.

A. Can I draw it? I think it would be easier if I draw it.

Q. Yes.

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[Vol. 5-A] [Testimony of Neal Benowitz (Feb. 26, 1999)]

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[Tr. 64] A. I have noticed that.

Q. You have noticed that.

On Wednesday, I told this jury that 50 million people in this country, according to The Centers for Disease Control, have quit smoking. And that is correct, sir, isn't that?

A. It's probably pretty close. It's a figure that is changing, and it depends if you're talking living people or all people who have ever smoked who have quit. But I don't contest that number.

Q. Well, the reason I raise it, and again it's a quibble, in your Direct Examination yesterday you said 45 or 50 million; right?

A. Yes.

Q. But a month ago you testified in another tobacco case. It was on — it was in January, January 15th, and it's true you were asked these question and you gave this answer.

"QUESTION: "According to The Centers for Disease Control, there are almost 50 million ex-smokers in this country today?

"ANSWER: "Yes.

"QUESTION: "50 million people who used to smoke and do not smoke?

"ANSWER: [Tr. 65] "Yes.

"QUESTION: "Those are people who have quit for good?

"ANSWER: "Yes.

"QUESTION: "That is about half of everybody who has ever smoked, isn't it?

"ANSWER: "Yes."

That was your sworn testimony, correct, Doctor?

A. Yes.

Q. And, again, I don't want to quibble, but I don't want the jury to think that I just made those 5 million people up. Okay?

A. Well, I would say that 45 million is almost 50 million, which is what I said before.

Q. Actually, a month ago you said 50, but I just want to —

MR. THOMAS: Objection. Misstates the evidence. Request that the quote be reread to the witness.

MR. COFER: Okay. I will.

THE COURT: And, counsel, we don't need to talk with each other regarding objections, please.

MR. COFER: I apologize. And I will [Tr. 66] reread it.

THE COURT: Proceed.

BY MR. COFER:

Q. Let me reread it slowly.

"QUESTION: "There are, according to The Center for Disease Control, there are almost 50 million ex-smokers in this country today?

"ANSWER: "Yes.

"QUESTION: "50 million people who used to smoke do not smoke?

"ANSWER: "Yes.

"QUESTION: "Those are people who have quit for good?

"ANSWER: "Yes.

"QUESTION: "That's about half of everybody who's ever smoked, isn't it.

"ANSWER: "Yes."

A. Well, let me say that I think any reasonable person, once saying almost 50 million people and then the other side comes back and says 50 million people, would not requalify every time. I mean I think that is very nitpicking. And I do not contest the 50 million. Whether it's 45 or 50, whether it's almost 50, I have no problem with it.

Q. Thank you. And I won't spent a lot of [Tr. 67] time on this, but the way they came up with 50 million is that in 1996 The Centers for Disease Control said approximately 46 million people quit; correct?

A. Yes.

Q. And the estimate is that a million and a half people quit every year; right?

A. Yes.

Q. So, if you start in '96 with 46 million some-odd, then you got to '97, you add a million and a half, and you go to '98 and you add a million and a half, you get into part of 2000, that is how you get to the 50 million number; right?

A. Yeah, but how many of those people have died?

Q. These are people — well, okay. The point is we agree on the 50 million; correct?

A. Yes.

Q. All right.

Now, let me tell you something else I told the jury in opening statement about five times, and I want to address these questions with you, Doctor. I told this jury that this case is about Jesse Williams, and so I want to ask you specifically what you know about Jesse Williams.

* * *

[Tr. 88] 25, and ask you if I read that correctly?

A. Yes.

Q. Okay.

And is that your opinion? Is that what the data shows?

A. Yes.

Q. Did you have any information that Mr. Williams was other than the average person?

A. No.

Q. Okay.

Let me show you a time line I used in opening statement. Mr. Williams began smoking in 1950; right?

A. Yes.

Q. Smoked his first Marlboro cigarette in 1955; correct?

A. Yes.

Q. We don't know what he smoked between '50 and '55, do we?

A. I don't.

Q. The average person is addicted within the first two and a half to three years; right?

A. Yes.

Q. You may return to your seat.

THE COURT: Mr. Cofer, at some point

* * *

[Tr. 92] we took the break was you told us that it was your opinion that on average a person who begins smoking at 18, 19, or 20 becomes addicted within year and a half to two years; is that correct, Doctor?

A. I said two to three years.

Q. Two to three years. Thank you for the correction.

And I think you also told the jury that you had no reason to believe Mr. Williams was anything other than an average person; correct?

A. Yes.

Q. So, let me just ask you the question.

Do you have an opinion, to a reasonable degree of medical certainty, whether Mr. Williams was addicted to nicotine cigarettes by 1955?

A. Yes.

Q. What is that opinion?

A. He was.

Q. So, your opinion is that Mr. Williams was already addicted before he ever smoked a Marlboro cigarette; is that correct, Doctor?

A. Yes.

Q. This time line shows that he began in 1955; right?

A. Yes.

* * *

[Vol. 7-A] [Testimony of Richard Pollay (Mar. 2, 1999)]

* * *

[Tr. 92] advertising, early advertising.

First of all, this in regard to what Jesse Williams saw in the '40s, in terms of what kind of an activity cigarette smoking is, what kind of product cigarettes are, what risks or health benefits that cigarettes have or don't have, who smokes, what kind of people smoke, what kind of person he might be if he smoked, would he be under the influence of ads besides Philip Morris' here?

A. Yes. He would have seen a wide variety of advertisements on behalf of cigarettes from a number of manufacturers.

Q. All right. Now, is there a term called cumulative impact?

A. Yes.

Q. Now, tell the jury what the cumulative impact — what does that mean?

A. Well, in the context like this, it would be the way in which our perceptions of the product class is shaped by all of the advertising in that product class. So we come to believe that these products are safe or effective or glamorous or something like that.

And then on top of that, of course, [Tr. 93] individual brands may have particular meanings as being appropriate for women or appropriate for men or the choice of certain occupations or things like that.

So our perceptions of a brand involves both our perceptions of the product in general and our expectations about the product, and then our perceptions about what's unique or special about this product that helps differentiate or separate

it from all of the other products to make it a little bit different.

Q. Does cumulative impact have anything to do with the term that we might be used to cross-pollination? I don't mean technical term, cross-pollination?

A. Well, cross-pollination is not a term I come across in my textbooks. So I'm not sure.

Q. Okay. Well, bad question. Let me withdraw it.

A. Okay.

Q. Is it a part of what you do, teach, that the image associated with a particular activity for one brand may have an impact upon another person's consideration of that activity, regardless of whether it's going to be with that brand or some

* * *

[Tr. 114] Q. And, although I know it's not a very good copy, why don't you come on down here because we are going to go over this. Would you, please, come on down to the podium? Bring that little pointer so you can point some things out, please. Okay. What's the significance of this date? Well, we know the significance.

A. The publication, January 4th, 1954.

Q. Okay. So, it was right after the first of the year?

A. Yes.

Q. And I have got a better copy of it, and I'm going to use that for purposes of this inquiry.

Now, could you just generally — let's before we get to some of the specific promises that they made, could you just tell us generally what is the Frank Statement and how did it come about?

A. The Frank Statement is the opening shot in the industry's battle to restore public confidence in cigarettes and was

published in this kind of very formal way that is all text, no pictures. It is style what we now call an advocacy ad, that is editorializing, another term sometimes used. It's not using pretty pictures or glib advertising phrases, but they writing it in a very [Tr. 115] formal way, almost like a legal document, where you would set out some premise and arguments.

And then, in addition, it has the formality of having all of the signers, that is all of the participants to the organization identified both as organizations and, I believe, as people. That is I think the CEOs or chief, you know, presidents or other executives were identified as the signers of this Frank Statement.

Q. And so here we are with our various signers that are people primarily in the tobacco industry, would that be fair to say?

A. Yes. And the list is a little longer than the list of manufacturers I gave earlier because this also includes people like wholesalers and growers and other people in the tobacco trade, in addition to those people making the finished products.

Q. Okay.

Now, in regard to the Frank Statement itself, was this something that went through a number of different careful edits that were circulated between companies before it came out?

A. Yes. There were a number of drafts. In fact, a number of drafts surviving, and, of course, [Tr. 116] this is the final version that was published.

Q. And I would like to go specifically to some of the items that are contained in here. And this would be the only time that I do this, but I want to do it in connection with the admission of the exhibits and not just in opening statement.

I noted the quality is not so good. Please follow along with me and let me know if I get it right.

First of all, our representations made that distinguished authorities point out a number of items, four different items. One, that medical research of recent years indicates many possible causes of cancer. Now from a public relations standpoint, why would it be that cigarette a manufacturer like Philip Morris might join in paying for an expensive ad where it was pointed out that there is many possible causes of cancer?

A. Well, to take some of the heat off of themselves. That is, the less people have the impression that cigarettes were the only cause of cancer. They wanted to remind people that, among other things, that there were many possible causes. So, they just wanted to spread the blame out.

* * *

[Tr. 118] to do more research, that nobody needs to take any action yet.

Q. Well, let me ask you a question. Through today, March 2, 1999, has Philip Morris continued to claim there's a controversy about the linkage between cigarette smoking and lung cancer?

A. Yes.

Q. And I guess, maybe three is more of the same. There's no proof that cigarette smoking is one of the causes?

A. Yes.

Q. And then, four, the statistics purporting to link cigarette smoking with a disease could apply with equal force to any one of many aspects of modern life. Indeed, the validity of the statistics themselves is questioned by numerous scientists. Is that right?

A. Yes.

Q. That is correct. Okay.

A. It's correct, that is what they say.

Q. Now, do those observations about the controversy get followed by promising?

A. Yes, they do.

Q. All right.

* * *

[Vol. 7-B] [Testimony of Richard Pollay (Mar. 2, 1999)]

* * *

[Tr. 85] things like that. Cigarettes has the highest rate of brand loyalty. What that means, most people keep smoking the same brand year after year after year. A very small proportion of people will switch from one brand to another brand in any given year.

Q. And is that consistent with what you found out about what Jesse Williams did as a consumer of cigarettes?

A. Yes. Jesse Williams' smoking history is very characteristic of the smoking history of many, many people. That is, to find a product he liked and smoke it and trust that it was a good product for him.

Q. Is it the cleverness of the advertising, from your perspective as a marketing expert, advertising expert, is it some special magic in their mix of their marketing that accounts for how it is that the brand loyalty is so high from this product?

A. I think it is both the nature of the product. That is, because it produces a very pronounced physiological satisfaction, that itself is a strong reinforcer, so people go back to whatever has been reinforced. And then the [Tr. 86] advertising works on top of that to offer continued reassurances, and through repetition create favorable impression that lots of other people are doing the same thing, it is okay. "This is a well-known, highly popular product," so on. So I'm not sure if that answers your question.

Q. It does.

A. It is a little difficult, in my mind, to separate out kind of the effect of the product and its capacity to deliver nicotine and nicotine satisfaction and the advertising and its capacity to offer repetition of the promise and the glamour and all of that stuff.

Q. What I would like to do for the next question is to separate what I mean by the question from what I don't mean.

First I will start out with what I don't mean. I don't mean to imply that Jesse Williams' free will was taken away from him by cigarette advertising, or that he is not responsible. But what I do mean is, was Jesse Williams a — I would like you to assume for purposes of this question that he was a highly habituated smoker, or [Tr. 87] addicted smoker, somebody from a marketing perspective who would be more likely to have brand loyalty and continue to smoke and be receptive to the Marlboro message than somebody who didn't have such a high level of habituation or addiction?

A. He would be more likely to be receptive than someone who wasn't habituated — who wasn't addicted or habituated.

Q. Because of the timing, I'm feeling pressed, because I want to finish with you by 5:00, so I'm just going to give you a leading question to get into a story. Are you familiar with an article that was written by Leo Burnett called Communications of An Advertising Man?

A. That title is actually the title of a compilation of his writings put together as a book, and it includes several articles. I'm familiar with the book as a whole, and several of the articles I have seen on a repeated basis.

Q. Again, is Leo Burnett the person who was sort of the mastermind of the Marlboro man and the cowboy?

A. He was.

Q. And did he come up with the term called

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[Vol. 8-A] [Testimony of Richard Pollay (Mar. 3, 1999)]

* * *

[Tr. 32] smoking, do you?

A. That's correct.

Q. When he started smoking, you don't know what his attitudes were towards smoking, do you?

A. I only know that it's reported that he was encouraged to smoke as a mosquito-control in the Korean situation.

Q. He was told by fellow GIs that if you want to keep the mosquitoes off you, you smoke and it will keep them away; right?

A. That's correct.

Q. You know of no other reasons why he started to smoke?

A. That's correct.

Q. You don't know what his personal perception of advertising was at that time, do you?

A. That's correct.

Q. Don't know what his views in general were about advertising, do you?

A. That's correct.

Q. You don't know if he was a cynical person about advertising?

A. That's correct.

Q. Other than the photos we saw yesterday of billboards and convenience stores in Portland —

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[Vol. 8-C] [Testimony of Richard Pollay (Mar. 3, 1999)]

* * *

[Tr. 12].

Q. Let's talk about the 1964 Surgeon General's Report. Now, you are aware that the results of the of 1964 Surgeon General's Report received widespread publicity, right?

A. Yes. There were a couple of days when it was in the headlines.

Q. Would you disagree with the 1989 report of the United States Surgeon General, "For several days the 1964 report furnished newspaper headlines across the country and lead stories on television broadcasts." Would you disagree with that assessment?

A. Well, I might qualify it. I'm not sure what they meant by "several." It would seem there were a couple of days, but there might have been follow-up stories. May depend on what is meant by "lead headlines." Certainly was prominent for a while. It was released on a Saturday and was released that Sunday and the first part of the following week.

Q. You are not trying to suggest to the jury that it wasn't a big story in 1964, are you?

A. It was a big story for a short while, that's what I am suggesting. It wasn't a big story compared to the civil rights issues that

* * *

[Tr. 20] read.

Q. Are you aware that the Gallup Polling organization did a poll in June of 1954 and reported that 89.9 percent of the American public had heard that smoking may cause lung cancer?

A. Yes, and I'm aware as well that they have recently published a paper objecting to your use of the misuse of that information. They carefully point out that even more people were aware of flying saucers and men from Mars, and the facts are more germane is that only 7 percent of people would identify cancer when given an open-ended question.

Q. Let's return to my original question. I understand your qualifiers, but you are aware that the Gallup Poll did a poll in June of 1954 and reported that 89.9 percent of the American public had heard of smoking may cause lung cancer; that's a correct statement?

A. That's correct. And, of course, the corresponding data would be that 10 percent had not heard of it.

Q. Let's go through that few more. Are you aware in 1964 a U.S. government survey found that 81 percent of all adults agree, not just heard, [Tr. 21] but agreed that cigarette smoking is harmful to health?

A. Yes. The issue there is — of course, is what the harm that is in people's minds; they are talking about sore throats and coughs, or are they aware of fatal consequences like various cancers.

Q. And 1964 was the year that the Surgeon General put out his report saying that cigarette smoking caused lung cancer in men, right?

A. Yes.

Q. In fact, didn't the United States Surgeon General say in 1979 that smoker are almost uniformly aware of the health risks of smoking?

A. By 1979 I think that's true, that the majority of people were aware that there were some risks.

Again, the issue is what risks they were aware of. And in these periods of time people attribute other things, like getting in and out of bath tubs, to be even riskier.

Q. Okay. Let's talk about lung cancer. Are you aware that, according to 1989 Surgeon General's Report, that about 90 percent of all adults agree smoking causes lung cancer?

A. 1989?

[Tr. 22] Q. 1989.

A. Yes, that evolved quite a bit over those 35 years.

Q. And you agree that the ordinary consumer today is aware that one of the risks associated with smoking is lung cancer, right?

A. Yes, despite the industry's denials of that, yes.

Q. Let's talk about the Federal Trade Commission. Now, the Federal Trade Commission is responsible for government oversight of advertising, including cigarette advertising, right?

A. Yes.

Q. The Federal Trade Commission has regulated cigarette advertising for decades, right?

A. Yes. They first attempted to do so in the late '30s and '40s.

Q. And the FTC requires cigarette companies to submit massive reports every year on their advertising, doesn't it.

A. They are not massive. The reports the FTC publishes is a matter of a few pages.

Q. The report the FTC publishes. You are

* * *

[Tr. 38] January of 1964.

Q. All right. What I'm going to do is to show you two — excuse me, two stories. One is dated Saturday, January the 11th. And these are old copies of old pieces of paper, but let's get the first here.

January 11, 1964. "New tobacco report designed to go beyond peril to lungs." And in terms of the response by the Tobacco Institute, I'm going to read this, and tell me if I get it right:

"The tobacco industry claims, however, that a causative connection between smoking and impaired health has not been proved. In a detailed report released Thursday" — so that would have been — if it was released Thursday, did it actually — they preempted the release of the Surgeon General's —

A. That's exactly what it is called. A presumptive strike to preempt the headlines and diffuse the news coverage on subsequent days.

Q. "At Greensboro, North Carolina, the nation's tobacco claim that a vast majority of smokers suffered no serious impairments of health or shortening of life. The Tobacco Institute,[Tr. 39] Inc., representing manufacturers," and then it kind of turns into an unreadable section.

But would it be fair to say that the tobacco industry was effective in getting its view contained even within the report about the Surgeon General's release?

A. Yes. On this and even in subsequent days, as well.

Q. That was Saturday, January 11. Now we will go forward to January the 12th, Sunday. The Sunday Oregonian. Sunday, January the 12th. And then we have got, "The report links the cigarette use with cancer," and go down to the verse mentioned — again, I will read it. "It is more prudent to assume that the established association between cigarette smoking and coronary disease has a causative meaning than to suspend judgment until no uncertainty remains."

I'm going to represent to you that that is the view that was taken in the Surgeon General's Report.

Now, in terms of this — I guess the content of this position, would it be fair to say that what this Surgeon General's Report is urging is that rather than holding off while — until the

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[Vol. 9-A] [Testimony of William Farone (Mar. 4, 1999)]

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[Tr. 131] mutagen as being a bullet shot towards the person. And let's say you're shooting, you know, 100,000 bullets, but they are far away. You might not really hit them. We can reduce that to 90,000. Then down to a 10,000. And then down to 5,000. You reduce the probability you are going to hit them. So that is the general philosophy of the safety research. It's to try and reduce the number of mutagens or probability of attack of that cell.

Q. When you were being recruited to go work for Philip Morris, did anybody suggest to you in that process that there was an unfair accusation being made against cigarettes as the cause of lung cancer?

A. No.

Q. When you were being oriented to the work that you were to do at Philip Morris by meeting with the other scientists and talking with them about various projects, did anybody ever suggest to you that there was a controversy about whether or not lung cancer was caused by smoking cigarettes?

A. Well, the issue of controversy came up. Dr. Osdene explained to me that one of his job functions was to maintain the controversy, was to fuel the controversy. I mean, there was no people [Tr. 132] within the organization weren't — I mean, in order to solve this problem, you have to recognize the problem, take steps to solve the problem. So, the people that were working on the problem understood the mechanisms that I just described, and they were working to try and reduce that.

By the same token, Dr. Osdene expressed the concept that part of his job was to attack outside reports of links between smoking and cancer or smoking and emphysema or

things of that sort by maintaining that there's a controversy and providing the information that would discredit or somehow cast down on the outside research.

Q. Was that subject with Dr. Osdene something that came up in conversation from time to time throughout your career there?

A. Yes. We had many discussions and arguments, if you will, concerning that.

Q. And we may see when we get into these documents a little more — some examples of it, but did Dr. Osdene express sometimes frustration and difficulty at the task of maintaining that there was controversy about these subjects?

A. Well, I think, you know, for Dr. Osdene it was an uncomfortable position to be in. And, I [Tr. 133] mean, Dr. Osdene was trying at the same time to work with us to develop safer products. So, it's sort of — it's a difficult position Dr. Osdene was in, a very difficult position, because at the same time he's trying to help the people within the research and development division develop a safer product, and on the other hand he's trying to come up with reasons why other people who might purport to discuss things about smoking and disease are incorrect. So, it's kind of a very tough position to be in.

Q. During your orientation to Philip Morris' business, did you also review documents available to you that went back in history before your contact with the company?

A. Yes. For every project that I reviewed, I went into the library. We had an extensive central file system. And in talking with people, I would ask them for documents. It's a typical scientific method to try and get as much information about past research done there as possible.

Q. And within the internal documents of Philip Morris, did you also find references to the acknowledgement of smoking cigarettes as a [Tr. 134] carcinogenic thing to do?

A. Yes. Well, carcinogenic — and, you know, because sometimes it's not nice to see things like this used in those words. You'll find that this summation of these three things referred to in a lot of reports as biological activity. It is also used when you don't want to be specific about what you are talking about. Caused a bad change. And/or this could be called biological effect.

But if you looked at the study and you went and talked with a person, you could usually determine which of the things we were talking about here.

There's another, just plain toxicity, because a lot of the compounds are just plain toxic.

MR. COFER: We can't see that on the monitor.

MR. GAYLORD: You want to move that over to your right.

MR. COFER: A little more.

MR. GAYLORD: To the right. Right.

BY MR. GAYLORD:

Q. Biological activity then, would it be fair to call it a euphemism that was used in the [Tr. 135] company to describe, without using words like carcinogen?

A. Yes. And if you read the reports you'll see it referred to a lot.

Q. Okay. Now, I just wanted to show you one example and ask you if this is — again this is an exhibit in evidence, Plaintiff's Exhibit 53, a Philip Morris document, dated March 25, 1964. It's large enough to read. Entitled 1965 Cigarette Program Objectives and Approaches. And is this a document you have some familiarity with?

A. Yes. I'm going to skip over to the topic of nicotine delivery on here just for moment, and we'll probably come back to that.

But with respect to what you learned at Philip Morris and your orientation about the relationship between smoking and lung cancer, Item 4 says: "The product design should include consideration of chemical carcinogens within the following framework." Is that one reference to an acknowledgement by Philip Morris that the cigarette products contained cancer-causing chemicals?

A. Yes.

Q. And were there many others?

[Tr. 136] A. Any others?

Q. Were there many other references?

A. Oh, yes, many others.

Q. Okay. Now, let's turn to a similar series of questions but different topics.

In your orientation to the cigarette business as a new employee at Philip Morris and your opportunity to converse with other scientists and work your way through the business — by the way, let me back that up.

Was that was just something you did on your own or was that a specific assignment that you received?

A. It was an assignment.

Q. You were instructed to familiarize yourself with the whole business?

A. Correct. It was a good idea. It was also an assignment.

Q. When you say the whole business, it wasn't just science going on and the science part but the manufacturing businesses?

A. That's correct. Special effort was made to make sure I even went out with, for example, the leaf purchasing team to buy tobacco. And, you know, out in the field. I went to the farms. [Tr. 137] Philip Morris doesn't grow tobacco, but — not in the United State's, but they buy it off the open market, but we had to understand how it was raised so we had actually to visit farms, and in our research we actually did work on growing tobacco on the farms. So all of that, right from the place where they grew it, to the place where they processed it, all the way through the entire process.

Q. Dr. Farone, before I leave the subject of cancer and the understandings and expressions of that subject, as you became oriented to the business, let me ask one question about that.

Did you ever run into anybody, in your orientation to the business of Philip Morris, any scientists, any manager, did anybody ever tell you that cigarettes smoking did not cause cancer?

A. No. And in talking with them — the science doesn't really work that way. You have a hypothesis. And your cumulative evidence which leads you to a hypothesis. The hypothesis is that smoking causes cancer by the mechanism I just described. In order to refute that, my hypothesis, you have to present evidence to the contrary

So I never heard anyone that they had [Tr. 138] evidence to the contrary.

What you would hear occasionally was that well so and so had published a paper and that paper wasn't done very well.

So, that doesn't provide additional evidence for the hypothesis. That is the nature of the so-called controversy. This controversy is attacking other people's support of the hypothesis. But I never heard anyone at Philip Morris say that they had any evidence to refute that hypothesis at no time.

Q. All right.

Now, I want to move to the subject of nicotine and addiction, and, again, ask you what you learned, what people brought to your attention, what became your understanding from your orientation about the internal knowledge of Philip Morris about the addictiveness of nicotine.

A. Well, the operating hypothesis was, even before I went there, it was never denied, is that people smoke for nicotine. That is the reason. Other alkaloids in tobacco. There are some other ones, may have some minor effects. There are some other things, but basically it's nicotine.

There was — I went there with the [Tr. 139] knowledge, for example, in the 1950's. There was a product on the market called Sano cigarettes, and it was King Sano. That was a denicotinized cigarette. And unlike decaffeinated colas, which captured the market, those products never made it. So, there was a general conclusion that was accepted that people smoked for nicotine.

And in addition, when I went, Philip Morris was in the process of introducing the Merit cigarette, which is the mid-'70s, when the low-tar category really came into being. And there was a recognition if you reduce the nicotine too far people might not smoke their product. On the other hand, the nicotine itself as far as was known was not — was toxic, but not mutagenic, and it's not carcinogenic.

So, what was being done there and throughout the industry was to maintain the level of nicotine to the smoker while reducing the tar.

So, while in general the nicotine was being reduced, it was not being reduced as much as the tar was being reduced.

So, everything was focused on the maintaining nicotine in smoke. I know — I think I want to go through [Tr. 140]

and not be too tedious about it, a series of documents, and with respect to the nicotine question.

Did you acquire knowledge from a great many documents that were in the files and archives of Philip Morris as part of your orientation about this subject of the relationship between nicotine and the reasons why people smoke, about the addictive quality of nicotine, habit forming, dependent forming, chemical-dependence forming qualities?

For example, Plaintiffs Exhibit 36, I'll set that aside and come back in a moment. Plaintiffs Exhibit 36 is dated August 3, '69, '59 — it's a lousy old copy, and it contains the question — this is from or to a Dr. Dupris in psychological research: Why do people smoke? And it goes on in several parts. But item 3, 1959, is addiction. Is that one of the documents that you are familiar with?

A. Yes.

Q. Is that part of the basis for your saying that that was an established understanding of Philip Morris?

A. Correct. There are many documents.

* * *

[Tr. 146] less effect." And Item 5: "Thus a new healthy cigarette entry could not rely on increased demands for health cigarettes but would have to take its place at the expense of existing brands of health cigarettes." Was it part of the understanding that you gained from your fellow employees at Philip Morris that it was known that the health concerns about cigarettes were more effective in preventing people from starting smoking than from in persuading them to quit smoking?

A. Well, actually not really, by the time I got there. This is an earlier document. But the interesting thing about the document, if you could put it back there for a minute.

Q. Okay. I have got more about it, too?

A. It talks about less effect on the demand for health cigarettes. So, you might — I asked the question well, what are we talking about? What's health cigarettes? The answer is that when they first put a filter on a cigarette that was viewed by the industry as being a health cigarette. In other words, it was an implied health claim because the filter obviously is going to help you [Tr. 147] get rid of some of the bad stuff. That's what's being referred to in the first health scare in the '50s. '50s where the advent of the filtered cigarette. And then the '70s, which comes after this document, the low tar era.

There's another thing in between which is also considered a health cigarette, and is that the addition of menthol. Menthol was viewed as being — you know, menthol is used for ease in coughing. Menthol is in cough drops and things like that. So, if you have trouble with your throat, and things like that you put menthol in a cigarette, obviously, it's going to help you.

So when I first heard about this stuff I was interested in what that meant.

Q. When you said obviously that is going to help, are you saying that it really was going to help or are you saying that was an approach?

A. That was an approach. I didn't see any. I didn't have any data, nor would I have seen any data at Philip Morris that would imply or show that a menthol cigarette was less carcinogenic or less toxic than a regular cigarette.

Q. Was the concept of a health cigarette as you have just defined it something that was used at [Tr. 148] Philip Morris as a kind of an implied representation about products to the effect that consumers would take them as more healthy?

A. The whole industry, actually. It's not a Philip Morris thing. It's just those are categories within the industry that

came about because of the perception that those things would be somehow safer.

Q. Okay. We'll probably get to some other documents that talk about perception of filtration being what mattered. On this page, Page 5, Exhibit 59, was Mr. Johnson's statement, quote, "A cigarette that does not deliver nicotine cannot satisfy the habituated smoker and cannot lead to habituation and would, therefore, almost certainly fail." Was that notion one of the sources and consistent with the information you received about the company's awareness of the addictiveness of nicotine?

A. Yes.

Q. And it's an essential role in the ability to continue to sell cigarettes?

A. Yes.

Q. I'm going to try move a little more

* * *

[Vol. 9-B] [Testimony of William Farone (Mar. 4, 1999)]

* * *

[Tr. 31] in order to compensate for that nicotine and in order for them not to get as much carcinogen as possible, the change in nicotine/tar ratio reduces relatively the amount of tar.

Q. Okay. If you are going to continue to make and sell a product that is addictive with nicotine, then would you say it is a good thing, in light of that, to reduce the amount of tar and carcinogens that you supply along with the nicotine?

A. That was the premise, yes.

Q. You mentioned compensation, and the jury has heard about that from other witnesses. I want to ask you, is the concept of smokers changing their habits to compensate and get more nicotine from a lower nicotine cigarette something that was understood at Philip Morris when you were there?

A. More than understood. We developed special techniques for measuring it, and we tested products in terms of delivery, as I mentioned, using a device called the human smoke simulator, where you had machines smoke the way you could collect data off of people so you could, in fact, engineer the cigarette by making changes in these different properties to deliver acceptable levels [Tr. 32] of nicotine.

Q. The human smoke simulator is not the same thing as the FTC machine?

A. No, it is a similar kind of machine. But the FTC machine — see if I can remember all this. We used about 30 milliliters, 30cc puffs, and we did it maybe nine or ten times, seven to eight times, depending on the length of the cigarette.

Length is an important factor, regular versus 100s, 85 millimeters versus a hundred millimeters versus 120 millimeters. Those are the three lengths out there. So normally

you might take a puff of — so many every 30 seconds. It turns out some people might take a puff every 60 seconds. They would take — 60 milliliters. One-second puffs or two-second puffs. They double the — I misspoke. I confused that. It is 30 milliliters in the FTC test, 60 to 70 milliliters in the human smoking. It's maybe one-second puffs versus two-second puffs. All those things change between the machine and the human.

Q. Let me move into some more specifics now.

In view of the understanding that we have about the things that were — the goals of making these changes, tell us about some of the things, I

* * *

[Tr. 58] look for carbon monoxide and other chemicals very, very quickly by this technique. It was an infrared technique. You passed a beam of infrared light through the gas out the back of the cigarette, you could instantaneous, almost a matter of milliseconds, determine the chemistry. We started analyzing our own products that way.

We started to analyze competitive products that way, and we used that for a while. In about 1980 or so, we determined that the competition, specifically R.J. Reynolds and the Winston brand had started to put ammonium compounds in their product.

The way we learned that, we saw the burst of ammonia go way up and we saw the increase of gas phase nicotine. And so that led us to go look at the analysis of the tobacco and made the determination that R.J. Reynolds was starting to add ammonium compounds to their products to make the subjective response of that product more like a Marlboro.

Q. We have heard about the tar derby or the tar wars. Was this something that could be characterized as the ammonia wars?

A. Well, there was considerable concern that [Tr. 59] if, in fact, the success of the Marlboro brand was dependent upon the relevant amount of ammonia compared to other brands, that now everyone would start putting ammonia in and that there would be an increase in saleability, shall we say, or acceptability of the competing products.

Q. Now, just a couple of reminders. I'm not going to take the trouble to show them again; they have been seen several times.

Exhibit 58 is a March 31, 1966 report on nicotine and smoke pH from the Philip Morris documents that we have, and it has a statement, "Nicotine delivery can be controlled via filler or smoke pH adjustment." And the jury has seen that several times.

Q. Is that a statement of the phenomena you have been describing?

A. It is related to the phenomena. As I said before, when the ammonia gas strikes the wet filler, it will drive up the pH or basicity of the filler, driving up the nicotine. Then if that were to further decompose, you would also see an increase in the smoke pH. But it isn't necessary for the smoke pH to go out to deliver more nicotine by sweeping ammonia gas through the wet [Tr. 60] filler. Usually does, but it isn't necessary.

Q. Exhibit 92 is another document that the jury has seen. Let me remind myself the date before I refer to it, which is the Schori Behavioral Research Laboratory report of October 1974, smoke impact from a psychologist's vantage point.

"Suggesting that smoke impact is due to nicotine, however, is nothing new. The important factor, though, is not the amount of nicotine in the smoke per se but rather it is the amount of free nicotine in the smoke, which determines the degree of smoke impact."

I want to relate that phrase "free nicotine" to what you have been telling us about ammonia.

A. The term "free nicotine" means a freebase, which is — or unprotonated, the kind in the gas phase. It can also be a small portion of the nicotine that is in the particulate phase.

Q. Another document is Exhibit 142, I think you have some familiarity with. I will tell you it is a February 5th, 1992 Philip Morris document from Dr. Gullotta — is it Gullotta (enunciating), is that how it's pronounced?

[Tr. 61] A. Yes.

Q. In which he outlines the 1991 accomplishments and includes this statement, that they, quote, demonstrated that systematic relationship between increases in filler pH and increases in gas phase presumably unprotonated nicotine, close quote.

First off, was that a new concept or demonstration in 1991, to your knowledge?

A. No, that's a continuation of the same hypothesis, or same rationale.

Q. And in the next item on that same report in 1991 Dr. Gullotta wrote, quote, demonstrated that the addition of basis to cigarettes. That's this freebase, one of the ways to do it would be the ammonia?

A. Yes.

Q. "The addition of basis to cigarettes enhances subjective and electrophysiological responses." Is that a finding consistent with what you have told us about was being done and known while you were at Philip Morris?

A. Yes, it is.

Q. And is that enhancement of subjective and electrophysiological responses another way of [Tr. 62] characteriz-

ing the goal of impacting the smoker by adding ammonia to the cigarette?

MR. COFER: Objection, leading.

THE COURT: Overruled. Go ahead.

THE WITNESS: Yes, it is.

BY MR. GAYLORD:

Q. Now, I want to ask you to share with the jury just some examples of other things. You told us there is 57. We are not going to go down the list at all. But there are one or two other significant parts of the — significant examples of the choices of things that could be manipulated in the Marlboro that were part of your knowledge and part of your work at Philip Morris that were used for purposes of enhancing smoker impac by nicotine.

A. Okay. When we talk about Marlboro, we have to understand that there is a variety of Marlboros. There is Marlboro Regular, Marlboro King, Marlboro Light, Marlboro Menthol, and so there are slight differences in the composition of all of those products. There is no single Marlboro.

But, in general, if you change the paper porosity, the place were the ventilation filters

* * *

[Tr. 64] there, anyway, they went back as far as five years.

The reason for that is that the alkaloid content. That's nicotine, nornicotine, or things like sugar and other contents change from season, from year-to-year, and also among the grades that they can go out and buy. So you have a lot of latitude in terms of manipulating the product simply by how you blend the different years, how you blend the different tobaccos together.

Q. Let me ask you now a somewhat more pointed question about the question of manipulation. We told the jury in

the beginning of the case that there was something about sugar that was one of the things known and understood and used for purposes of enhancing the nicotine effect of cigarettes at Philip Morris. Is that a starting point for a story you can tell us?

A. Well, yes. First thing we have to realize is that before you talk about manipulation, you talk about discovery. In other words, you have to have some finding that leads you to something that is usable.

In this particular case, I characterize [Tr. 65] it more as a finding than — it starts off and, look, why do we see certain effects with certain products where the nicotine seems to be giving more of an effect? One of the determinations that was made at least within some rat studies going on, one of the degradation products of sugar, it is not only from sugar, but primarily it can come from sugar and tobacco, a compound called acetaldehyde.

Q. I'm going to have you write that one down for us, if you wouldn't mind.

A. Sure. (Witness complies.)

Acetaldehyde is important for several respects. First of all, it is a carcinogen. Second of all, it is one of those things that if you were to ingest it, it gets turned into acetic acid, like vinegar, relatively harmless.

If you inhale it, acetaldehyde is not good. It is related to formaldehyde for preserving specimens. This is a decomposition byproduct of sugar. One of the scientists, Dr. DeNoble, found there would be an interaction between acetaldehyde and nicotine which opened up the thought process, if you will, that there are many compounds that are in smoke that enhance the [Tr. 66] effect of nicotine.

The research laboratory I think I mentioned earlier had been working on nicotine analogs. Those are chemical com-

pounds that kind of collect nicotine, but they are different. The reason for that, nicotine has an unfortunate side effect of changing your heart rate, increasing it. It is linked to some cardiovascular problems. It has two effects, one on your central nervous system and one on the peripheral nervous system. If you could eliminate the bad effects and keep the good ones, that would probably make a safer material. So we were looking at those compounds.

Sugar played a role in both things. First of all, sugar, as we say, provides acetaldehyde, which maybe could increase the effects of nicotine. The other thing, if you mix sugar with protein or amino acids and cook it, Philip Morris called those cooked flavors, and you put those in a cigarette, you would create a class of compounds called pyridines and pyrazines. Pyridines, the simplist nicotine analogs are pyridine compounds. Pyridine itself is a simplest analog of nicotine.

Sugar was implicated in two ways; one in [Tr. 67] acetaldehyde and this cooked flavor, where the objective was to add things to a cigarette that would enhance the effect of nicotine.

Q. Now, you mentioned Dr. DeNoble, and Dr. DeNoble is one of your colleagues at the research center of Philip Morris?

A. Yes. He didn't work for me. He worked in Dr. Dunn's group under Dr. Osdene.

Q. That was the group you told us about earlier that did the testing to implement things that your group might have come up for possibly improved safety of products?

A. That's correct.

Q. And did Dr. DeNoble have a specialty of testing animals, rats in particular?

A. His specialty, he had a laboratory where he used rats as a medium for testing the effects of nicotine, yes.

Q. And in the process of rat testing did he discover that there was an enhancing effect of the nicotine on rats when acetaldehyde, an increased component of the smoke —

MR. COFER: Objection leading.

THE COURT: It is leading, Mr. Gaylord.

MR. GAYLORD: I will rephrase.

[Tr. 68] BY MR. GAYLORD:

Q. What can you tell us about Dr. DeNoble's discoveries, if any, about acetaldehyde and its relationship to the effect of nicotine on rats?

A. Dr. DeNoble was primarily studying the nicotine analogs that I mentioned that were being synthesized by Dr. Jeffery Seeman and his coworkers. And, in addition to that, he decided to study other chemicals that might interact with nicotine that were present in smoke in relatively high amounts. So acetaldehyde was one of the compounds that he selected for study, and he found that it had, in this rat test, a reinforcing effect on nicotine in rats.

Q. Were adjustments of the amounts of sugar for purposes of determining — for purposes of having an effect on the impact of nicotine to smokers made in Philip Morris cigarettes?

A. I don't know.

Q. Were adjustments to the — what you called cooked flavors made in the cigarette products that would affect the nicotine impact on smokers?

A. Yes.

Q. And the — let me ask you this: If we [Tr. 69] could go to the manufacturing plant where they made Marlboros for Philip Morris and walk through the plant and look at the various vats and pipes and things that are used in manufacturing at Philip Morris, would we see steps in the process that

included adding ammonia to the material that was going to go into the Marlboro?

A. Yes.

Q. And tanks labeled "ammonia" and pipes going into the other vats and pipes to do that?

A. You would see ammonia, urea, diammonium phosphate. You would see a lot different chemicals. Propylene glycol, glycerin. There are a lot of chemicals I've mentioned. The chemicals comprise about 20 percent of the weight of everything that is inside the rod, the tobacco part.

Q. I didn't ask you this earlier. In the process of manufacturing the cigarettes, is the nicotine just left alone, or is it in itself manipulated?

A. Nicotine comes in with the tobacco they buy. They buy the tobacco and then they analyze it before they put it in storage. I mentioned they take it out of storage sometimes over five [Tr. 70] years, three years to five years. So we know where all the nicotine is, and then depending on how much nicotine you want for a specific product, you can select between the various amounts.

One of the misconceptions, I think, is that manipulation involves adding extra nicotine. You don't need to do that at all. All you need to do is jiggle it from one place to the other to where you want.

So, for example, in the '70s, when I got there, Merit cigarette, they increased the amount of high alkaloid or high nicotine tobacco that was used in that specific product to change the nicotine/tar ratio. So even though you are not buying nicotine from a nicotine store and putting it into cigarettes, you are changing which products it is in and how much by how you manipulate your warehouses full of nicotine and tobacco products.

Q. Is the nicotine that results, the level or amount of nicotine that results in a Marlboro an accident?

A. No, nothing in those products is an accident. I mentioned that they blend over crop years. Approximately every quarter you have to [Tr. 71] change the blend formula. It is very carefully engineered. Everything is very careful and controlled.

To give you an example, when you run a tar/nicotine test, the test prescribes that you go out and take like certain number of cigarettes, let's say 200, or packages. There is a protocol for doing that. If you didn't regulate things very carefully, what would happen is you would have a very wide error in — you smoke one cigarette and have lots, and the next one would have a little bit.

The industry, over the last 50 years, has moved to being able to make a very, very consistent product in both tar delivery and nicotine delivery. In order to do that, you have to manipulate and control the product almost totally.

Q. If we told the jury that they essentially take out the nicotine and put it back in measured amounts, is that concept reasonably accurate?

A. In certain respects, if you talk about this sheet-making process that I was talking about. If you make it out of the paper sheet, what you are doing is you put fiber down. Fiber

* * *

[Tr. 79] those projects were.

Q. Were you and the people working under you and the people working in the other directorates that you were aware of able to successfully bring into the marketplace substantial improvements in the safety of Philip Morris cigarettes?

A. We don't know. The predominant evidence, the answer is no.

Q. Were you aware of programs that were undertaken and pursued but stopped short of completion by policies at Philip Morris?

A. Yes.

Q. Can you describe at least some examples of that phenomena?

A. Yes. One example is you mentioned earlier the negative effects of nitrate in tobacco. When I arrived at Philip Morris, there was two — there was an ongoing method at the plant where they made this paper sheet. They could remove about 90 percent of the nitrate that was in the tobacco, because at that point you are taking the tobacco waste apart. You are making fiber, and you have what we call the soluble part.

So you could cool down the soluble part and you would proceed to take out little crystals

* * *

[Tr. 87] A. Yes, he was.

Q. I want to change directions with respect to a subject that you have mentioned a couple of times, and you have said that there were secret or off-limit areas of research.

Let me ask you — let me introduce the subject this way: You are familiar with the term "gentlemen's agreement" in the context of the tobacco business?

A. Yes, I am.

Q. Did you come to know that there was a — by whatever name, a gentlemen's agreement between different members of the tobacco industry about what kinds of testing and development would and would not be undertaken by the companies?

A. Yes, I did.

Q. Was that something that you came to learn about because in your department's research work it sometimes frustrated your efforts?

A. Well, we — in my opinion, this made sense. We supposedly were making safer products. In order to determine whether or not the products are safer, you have to test the product, the final product. You can't test some surrogate for the product.

[Tr. 88] If you want to know, for example, whether Merit cigarette, which is a low tar cigarette, is safer than Marlboro cigarette, you have to test Merit versus Marlboro. And I couldn't find, while I was there, much evidence that was being done.

So my conversations with Dr. Osdene, Dr. Seligman, later Dr. Hausermann, who was my boss, Dr. Wakeham, Mr. Resnick centered around, well, this type of testing and how are we going to do this type of testing? And we were told — I was told by all those people that we can't do that kind of testing, because we have agreed among the cigarette companies not to test animal tests products, and we agreed in the United States and we agreed to not final test the products.

I said, "How are we going to find out?" I was told that type of testing was being done in Europe primarily at a place called INBIFO, I-N-B-I-F-O, and that Dr. Osdene was coordinating that testing at INBIFO. I was told by my boss that either Dr. Seligman in the beginning, or later Dr. Hausermann, that the way I could find out about the results of that testing was by consulting with Dr. Osdene.

Q. Let me see if I understand the [Tr. 89] development of this part of your knowledge. You came to work at Philip Morris and you were instructed to orient yourself to the business and learn what you could about how things were done?

A. Correct.

Q. And you did that. Did anybody give you at any point that document that either was called the gentlemen's agreement or contained the gentlemen's agreement?

A. No.

Q. Did you ever see a document that said, "We have got a deal and here is the gentlemen's agreement and we're not going to do certain things"?

A. While I was there?

Q. Yes.

A. Not while I was there.

Q. Over time did you develop an understanding that there were limits to what you and other researchers could do, based on an agreement between Philip Morris and the other manufacturers?

A. As I indicated, I was told that by Dr. Osdene, Dr. Seligman, Dr. Hausermann,

[Tr. 90] Dr. Helmut Gaisch, Dr. Osdene's counterpart in Europe. Dr. Wakeham. Just numerous people, because as you worked at a place longer and longer, you developed more and more information, and that's — I knew about it.

Q. Was this something you learned about by asking about particular tests that you thought should be done and finding out on more than one occasion that there was some reason you couldn't?

A. Let's choose a specific example. It is easier for me.

We made this denitrified RL sheet. The sheet alone, when you tested it, looked like it had no nitrosamine in it. The question is, how big an effect would that have if you used that sheet in the Marlboro cigarette? In order to know that, you would have to incorporate that into a Marlboro cigarette and test the current Marlboro cigarette versus that in

biological tests, in vitro and in vivo biological tests, to determine whether or not it was safe.

That's what we were trying to get done, so we would know. The way that supposedly was going to work was that Dr. Osdene would take care of those kinds of testing and then we would be [Tr. 91] told of the final results.

Q. Now, you said you wanted to test that in a Marlboro cigarette. I'm going to surmise that if you put that in there you wouldn't call it a Marlboro at that point.

A. No. Changes are being made every three months. Changing the blend components we talked about. If you put that in there, you could still call it a Marlboro. But the thing is, you want to put it in a product that is being tested; Marlboro, current Marlboro versus modified Marlboro, and new Marlboro. You can still do that. But the main issue is to test the product, the final product that you are going to sell.

Q. Is there is a concept called whole product testing?

A. Concept in almost every consumer product I'm aware of.

Q. Has that concept in your career, excluding Philip Morris, been an essential step in determining whether there are any unforeseen harms to come from a product before it is put on a marketing —

MR. COFER: Objection, leading.

THE COURT: Overruled.

[Tr. 92] THE WITNESS: Whole product testing, in my opinion, in every industry I have worked in outside of Philip Morris is a requirement. You want to test the product that you sell, particularly for a consumer product. It is a product the consumer uses or comes in contact with, and you need to anticipate all of the problems that you can anticipate for that problem and you need to study them.

BY MR. GAYLORD:

Q. From your experience at Lever Brothers, for example, had you ever encountered a situation where there were restrictions or limitations against performing tests on the final product before it was sold?

A. No. And I had a different position there where I could, in fact, help — I was involved in determining which tests we wanted to do. That's usually a joint process of many people to determine what tests you do. It was open. Everybody knew what tests we were doing. They knew the rationale for those tests.

Those records were open for inspection by all of the scientific staff, by any pertinent agency that might want to come in and look at the [Tr. 93] records. It is usually an open-book kind of thing.

Q. Lever Brothers is a company that has competitors?

A. Yes.

Q. Did the fact that they were competitors in the field selling similar products prevent Lever Brothers from performing whole product testing?

A. No. Not only did we do it on their product but to make sure our product was no more hazardous and worked as well as the competitor's product.

Q. I want to get back to the gentlemen's agreement and understand what were the dimensions of the gentlemen's agreement as you understood it.

As you learned of it, did the gentlemen's agreement include a restriction on any finished or whole product testing by Philip Morris?

A. Yes. Their product and of the competitor's product. So, for example, at the time I was there, Carlton was the lowest tar product on the market, so one might assume that it

might be safer. That was the hypothesis we would operate under.

[Tr. 94] How do you know if it is really safer? So you would have to test it versus Marlboro versus Merit. We came out with Merit Ultra Lights to kind of compete with that. Was it better, equal, the same? Did the blend changes we made, did the manipulations we were doing, are they any better or, in fact, is the cancer-causing potential for a low-delivery cigarette the same as a Philip Morris unfiltered?

Q. If it is possible for you to list the pieces of the gentlemen's agreement, I'm going to ask you to do that. And we have got one of them identified so far. No whole product testing.

A. Let's call it finished product testing. Basically, this is no — no competitive product testing.

Q. So you couldn't test a completed Marlboro, but you also couldn't test a completed Winston?

A. That's correct.

Q. Go ahead.

A. No animal testing in the U.S.

Q. Okay. I will ask you some more about that. Is that the list?

A. Yes.

[Tr. 95] Q. What about testing for cancer-causing potential? Carcinogenicity?

A. Outside of these compounds, lots of testing was done for mutagenicity at Philip Morris in cells. We had like — I don't know if people are familiar with — that's the microbial level tests that we use for mutagenicity —

THE COURT REPORTER : Can you repeat that.

THE WITNESS: There was hamster cell testing. There was a bunch of cell level testing, but we would not use finished product in that smoke from finished products.

We would test Burley versus Bright versus expanded tobacco, so you would test parts of the formulation. From that, you would try to infer whether you were headed in the right direction.

I don't want to give the impression we are not testing. We are doing a lot of testing. The problem is, if I — the example I used. If I made an RL sheet, and that test that shows that it is fantastic, it doesn't cause the mutagenicity, now how do I move from there to find what it does in any product I use it in? I have to test it in the final product in the same [Tr. 96] or different tests, and I have to compare it against different products.

BY MR. GAYLORD:

Q. Was it your understanding that the other cigarette manufacturing companies in the United States had made an agreement that they would not do the same kind of testing that Philip Morris would not do?

A. That was my understanding.

Q. Did you learn at any point why this restriction on testing had been implemented? In other words, what motivated Philip Morris and its competitors to agree not to do these kinds of tests?

A. Two explanations were normally given. One is a competitive war based on safety. As I understood it from my superiors, that there was a very great reluctance to enter into a competitive war based on safe cigarettes. The second part of it was — had to do with potential litigation to not have a paper trail that would look bad should there be potential litigation.

Q. I'm going to ask you to look at Plaintiff's Exhibit 73. This is a document from 1969, I believe. It is a Philip Morris document [Tr. 97] and the name H. Wakeham is at the top, along with Mr. Millhiser.

A. Yes.

Q. Who is Mr. Millhiser?

A. Mr. Millhiser was a senior executive in Philip Morris and then Philip Morris U.S.A. At the time I was there, he was one of the co-chairman or vice chairman.

Q. And you know Dr. Helmut Wakeham?

A. I know both of them.

Q. Dr. Wakeham at this time in 1969 was vice president of research and development?

A. Yes.

Q. It might have been a slightly different title, but vice president in the scientific end of things. And in the highlighted passage the document says, "Unfortunately, too, the scientific expertise of the industry, because of the liability suit situation, has not been permitted to make a contribution to the problem. The contribution, which I believe was and is vital because the industry scientists are willing to consider the scientific problem from the point of view of the industry rather than from a position [Tr. 98] of the public health agencies." Is that quoted passage relevant to what you have been telling us about the gentlemen's agreement?

A. That's consistent with it.

Q. Is the suggestion that it has to do with the legal problem consistent with your understanding of the gentlemen's agreement?

A. Consistent with my understanding of why there was such an agreement and why Philip Morris was not willing to do this type of testing.

Q. During your career at Philip Morris did the company or any of its representatives, to your knowledge, ever acknowledge publicly that there was a health problem associated with cancer in cigarettes?

A. I don't think they did. We lived in — we worked in a relatively small environment in Richmond, Virginia. I didn't follow all of the releases of the various agencies representing the tobacco industry, but I'm not aware of any such admission.

Q. Did you gain an understanding during your work there that one of the reasons not to be doing the kinds of testing that you have described as [Tr. 99] restricted was that there not be documents produced that discussed the question of cancer in cigarettes?

A. The desire not to have documents admitting that cancer was caused by cigarettes was expressed many times.

Q. Now, you described — you mentioned getting some test work and — I don't know if you still need to stand over there. I don't have anything to show on the TV right this minute.

You described getting an understanding that there was some testing done in Europe.

A. Yes.

Q. Tell the jury what that was like in terms of how you and your people could get, if you could get access to any testing work done in Europe.

A. Well, we would provide the product modification either in the form of prototype cigarettes or suggestions for how to change an existing cigarette. Sometimes those products would be made in the United States by Dr. Gannon's group or later Mr. Tortrino's group. This is the development people that actually made the product.

So we would suggest how they make them. They would take those products. We would take [Tr. 100] them to Dr. Osdene or one of Dr. Osdene's associates, Dr. Robert Carpenter, Jim Charles, Bill Coon, who worked for him and later worked for me. Dr. Robert Pages. There was a series of people working for Dr. Osdene to whom we could take the concept or product, who would then be responsible for seeing that the proper testing was done, either if it was in vitro testing, that would be done in Richmond, or send it overseas for the animal testing.

And the information, when it came back, would come back to Dr. Osdene. And then what I was supposed to do was to talk with Dr. Osdene about the results of those tests.

Q. How did you work your standpoint as a scientist; was that a satisfactory way of receiving data and test results?

A. It is not ideal, not satisfactory, really, but the issue becomes at some point whether you are going to try to work within the system. I must say that over the time period that I was there, there was always an indication given to me that the system was going to change, that it was going to become more open, it was going to become better.

[Tr. 101] There was an acknowledgement by my boss. A lot of times in order to see a result I would have to go to Dr. Seligman, who would then force Dr. Osdene to show me the result. Not always. Sometimes Dr. Osdene would talk about the results.

Q. Did you have an understanding about whether or not there was any paper trail of test data or test results allowed to flow back and forth across the Atlantic Ocean?

A. Yes, I did. Remember, we are going to distinguish between two types of testing. One is the animal, or in vivo testing, because the in vitro testing done in Richmond, it was much easier to get access to that data. There were reports

written, we could go to meetings, and hear the results. We have to be careful here.

The in vitro testing, the lower level, your first cut at whether it is working or not, still no finished product, still no competitive products, but at least the general concept, like the things that I mentioned before that we had access to.

The animal testing data was the part where there was not supposed to be any paper trail, and Dr. Osdene indicated to me that he [Tr. 102] could not even allow those documents to be on premises.

Q. Was Dr. Osdene sort of the conduit for information from European testing?

A. Yes. He was — that was part of his job responsibility, to interface with the European testing.

There was also testing to be done in the United States that I thought at the time was being done under CTR, or other — there were studies being done in the United States also. But our product testing, the one that was supposedly testing our whole products and testing them against competitive products, was being done in Europe.

Q. Dr. Osdene is a familiar name. Is he the one, correct me if my memory — is he the one who was also involved in maintaining controversy?

A. Yes. Dr. Osdene — on several occasions we had long discussions, many occasions about part of his job description was to be involved in the smoking and health controversy.

Q. Did you ever get to see written document results, papers with writing on them that showed test results from Europe?

[Tr. 103] A. Twice did I remember, yes.

Q. How did that happen, or tell us about what happened?

A. One of them is the nitrosamines in our product.

Q. That's the main carcinogen?

A. Yes. The tab specific nitrosamines testing was done on product and some of that was done in Europe. Dr. Osdene showed me the results in the presence of, I recall, Dr. Charles and Mr. Carpenter. And then he indicated, "Well, I wasn't even supposed to show you that. I have to destroy it. Please give it back to me," which I gave it back to him.

I didn't see him destroy it, but he said he wasn't even supposed to have that there.

Q. Okay. Did you have an understanding of why he was not supposed to have that there?

A. Well, yes. He told me that none of the data generated in Europe under the egis of INBIFO or even Philip Morris Europe back to INBIFO was supposed to be on premises in case there was litigation, that those documents would not be discovered.

Q. Was it your impression that the

* * *

[Tr. 108] Joseph Cullman, III.

Who was Joseph Cullman, III?

A. When I was there, he was the chairman of Philip Morris Incorporated.

Q. He wrote to Dr. Wakeham on February 24, 1970 regarding offshore research, "The possibility of getting answers to certain problems on a contractual basis in Europe appeals to me and I feel presents an opportunity that is relatively lacking in risk and unattractive repercussions in this country."

Is that a document that you are familiar with?

A. Yes.

Q. Is that a document that describes at least some of the motivations behind the restrictions on research in this country that you have been talking about?

A. Yes.

Q. A separate document, the next numbered exhibit. Plaintiff's Exhibit 76 is Dr. Wakeham writing to Vice President Goldsmith at the time when they bought INBIFO. You used the word "INBIFO." You are familiar with that as a facility that Philip Morris purchased in Germany?

[Tr. 109] A. At the time I was with Philip Morris I didn't realize they purchased it until late in my career there, but, yes, they purchased it.

Q. In other words, you didn't always know that it was owned by Philip Morris, but you cameto know that?

A. Yes. When I was at Lever Brothers I was aware of it as being an independent testing laboratory, and when I first joined Philip Morris Dr. Osdene and Dr. Gaisch and some other people led me to believe still it was an independent laboratory. But I think it was 1983 or so, somewhere before I left I became aware that it was owned.

Q. Dr. Wakeham wrote recommending buying INBIFO, quote, since this is a locale where we might do some of the things that we are reluctant to do in this country, close quote.

Is that your understanding how INBIFO was being used by Philip Morris in your career?

A. Yes.

Q. Dr. Seligman was one of your immediate superiors at Philip Morris?

A. Yes, for the first part of my career there.

[Tr. 110] Q. He was replaced by Dr. Hausermann in that same position?

A. That's correct.

Q. Dr. Seligman. Plaintiff's Exhibit 97 also in evidence and seen by the jury, and I will quote quickly. Dr. Seligman wrote to Dr. Hausermann — this is March 31, 1977 — noting that Philip Morris has, quote, gone to great pains to eliminate any written contact within INBIFO, and I would like to maintain this structure, close quote.

They were sending samples to Neuchatel?

A. Neuchatel is where the Philip Morris Europe R&D lab was. Dr. Hausermann at that time was the vice president of research and development of Philip Morris Europe at the laboratory in Switzerland.

Q. He wrote that — Dr. Seligman wrote they were shipping stuff to Neuchatel to, quote, transmit to INBIFO. If this procedure is unacceptable to you, maybe we should consider a dummy mailing address in Cologne. The written analytical data will still have to be routed through FTR, which is in Neuchatel, if we are to avoid direct contact with INBIFO and Philip Morris [Tr. 111] U.S.A., close quote.

Are you aware of that 1977 document?

A. Yes, I reported to Dr. Seligman at that time, and that's part of the genesis of my knowledge of the entire subject.

Q. And this would make it sound like — and I will ask you, was the restriction on dealing with Europe research for Philip Morris such that you couldn't even directly mail things back and forth?

A. Well, that says — I didn't — I never had the opportunity to go there or send them anything directly. Mine always went to Dr. Osdene and one of his colleagues, and they would take care how it got there.

I don't know — they made visits there.

I know that. I talked to them about it. I don't know whether they carried samples at the time they made the visit or how that was done.

Q. Is the experience that you had with Philip Morris, including the gentlemen's agreement and the restriction on research, and including the reticence to bring forward scientific developments, aimed at making cigarettes a safer product consistent with published statements by [Tr. 112] Philip Morris in the industry that said, "We accept an interest in people's health as a basic responsibility paramount to every other consideration in our business"?

A. No, it is not.

MR. GAYLORD: I want to ask Ray to put on Plaintiff's Exhibit 108 on the viewer.

BY MR. GAYLORD:

Q. You are welcome to come down here. I don't know if you can see it from there, Doctor.

This is a letter from Dr. Seligman to Dr. Spears, who was apparently research director at Lorillard.

A. I know them both, yes.

Q. Is this dated March 31, 1980?

A. Yes.

Q. On the first page, which is the cover letter, there is a highlighting which shows a statement, "I have added a list of three subjects which I feel should be avoided." The context is referring to test subjects for scientific research.

A. If I recall correctly, this has to do with research that CTR should do, or one of the groups, tobacco groups.

[Tr. 113] Q. Perhaps. I'm just reading a section of it. Let me look at the whole letter.

Yes, it is recommendations for industry research which they prepared last year. "To that end, you will find attached a list entitled Potential Long-term Scientific Studies which Dr. Osdene and I generated early last year."

Then there is an enclosure that has a long list of subjects, and then there is a second page which is the one referred to in the last sentence that we read and it is three items to be avoided for research. It says, "Developing new tests for carcinogenicity is Item 1. Attempts to relate human disease to smoking for Item 2."

A. Yes. The third one is also significant.

Q. I can't read it from here.

A. It says, "Conduct experiments which require large doses of carcinogen to show as additive effect of smoking."

Q. Under the circumstances — let me depart for a moment on that subject.

Item 3 on there that I did not highlight, is smoking, as you understand the process, a behavior that results in large exposure to any carcinogens that happen to be in smoke because of [Tr. 114] the frequency of the use of the product?

A. There are large doses already there.

What I believe this refers to, if I remember conversations of the time had to do — talk with Dr. Osdene about testing being done in Europe with regard to the effects of some of the additives that were being used.

Q. In your experience in consumer product testing before Philip Morris, was it important to consider the way a product is used and the frequency and amount of exposure that it would generate?

A. Yes.

Q. And should testing be designed to take into account the extremes of exposure in order to adequately address the question of risks from the product?

A. Well, yeah. It also — not only the extremes of exposure, but what this relates to is if they wanted to show that — by "they" I mean the industry, Philip Morris directly, that an additive was okay, what you do is you take a highly carcinogenic reference cigarette. You test that. You add a little bit additive to that and you test that. You show there is no difference [Tr. 115] between the reference cigarette and the reference cigarette plus a small amount of the additive. You say, "See, the additive didn't make this any worse."

And that was a particular kind of additive testing to which I objected to at the time, because I felt it was playing tricks with the test system.

Q. With respect to this statement of three subjects to be avoided in testing by the industry testing process in the CTR, I hadn't thought of this before, but I will ask, does this appear to represent perhaps a documentation of at least one-manifestation of the gentlemen's agreement?

A. Well, they are all — yes, this is consistent with the gentlemen's agreement.

Q. Is this limitation on testing by the industry consistent with the practices of an industry that is concerned about the health effects of its product?

A. No.

Q. Is this representative of an industry that holds people's health as a basic responsibility paramount to every other consideration in their business?

* * *

[Vol. 10-A] [Testimony of William Farone (Mar. 5, 1999)]

* * *

[Tr. 61] Q. Okay.

A. Because that's the only way you know whether the change you have made are actually getting to the smokers. Smokers don't smoke reference cigarettes.

Q. Okay. A couple things on that. Well, did the Surgeon General or the National Cancer Institute or Ernst Wynder at the American Health Foundation, they were able to test Marlboro and Merits, whole product testing?

A. I think the agreement with the National Cancer Institute was they wouldn't do that.

Q. Well, a private researchers out, you just have to go to the store, buy them off the shelf and take them in and do full product testing all day, right? That testing can be done?

A. That testing can be done, that's true.

Q. Okay. Well, has that testing been done and shown big differences?

A. I don't know if anybody has had the resources, other than the tobacco company whose products they are, to do that type of testing.

You have to have animal laboratories, you have to have cell testing laboratory to do that.

Q. You can contract that stuff out, can't [Tr. 62] you?

A. Who is going to contract it out?

Q. How about the Federal Government? How about the National Cancer Society?

A. I am losing you here.

Q. My point is, as I understand where your complaint is, is Philip Morris didn't test a Marlboro as a Marlboro, right?

A. And the suggestion — what you're saying is that we can use taxpayer money to test the products at Philip Morris, they don't need to do that?

Q. You don't want to get into taxes, do you?

You don't want to go there, do you?

A. You can.

Q. Here's what I'm saying. Philip Morris tested reference cigarettes, correct?

A. Correct.

Q. Philip Morris tested additives, right?

A. Philip Morris tested additives?

Q. Additives to tobacco.

A. They tested them separately from the reference cigarette?

Q. So Philip Morris tested, for example, when you burn it, it becomes carcinogenic. I [Tr. 63] don't want to spend a bunch of time on this, but we can, as I understand the debate, where it is sufficient to test the reference cigarette and the stuff you put in it separately, or whether you need to test the stuff altogether. Is that what we're talking about?

A. No, no.

Q. Okay. Let me ask you this, you would agree, whether Philip Morris did it, other people could have done it if they wanted to?

A. I agree that other people could have done it if they wanted to.

Q. Can you cite a study where they said the Marlboro testing is different or worse? The whole product testing made a difference?

A. Yes.

Q. Tell me the study, write that down.

A. It is in the Japan Tobacco and Salt Monopoly, the Japanese patents. They don't list what they are.

Q. Let's write that down. Let's flip a page. Whole product testing that was done on Marlboro that shows something different.

A. Okay. The problem is I don't know which in that study is which brand.

[Tr. 64] Q. If you don't know which was which brand, how can you tell the jury what it meant?

A. No. The question was whether or not it was done. I am just telling you I know where such research was done. It was done under codes. You would have to ask the Japan Tobacco and Salt Monopoly, what it is called now, which one was which, but they did that for some of their patent work to show that the — their patented products were safer, were safer than Marlboro, but I don't know which was which.

Q. Was that published in the scientific literature?

A. I believe — certainly, it is in the patent literature, but, yes, there are scientific literature.

Q. Write down then Japan Tobacco, patents, scientific literature.

A. (The witness complies.)

Q. Would you write testing up there, it's whole product testing.

A. (The witness complies.)

Q. Okay. Let's go back to projects Philip Morris killed. Do you know how much money was spent on genetic modification of tobacco?

[Tr. 65] A. Well, the problem with this is there are two projects. There is one while I was there, and there was one

after I was there, the Calgene project, C-a-l-g-e-n-e, and I don't know that one. The incident here was to — I believe the contract if I recall correctly was $300,000. It's with a company called Crop Genetics International, and we probably spent another half a million dollars internally.

Q. So Philip Morris contracted with an outside company to do some of this?

A. Yes.

Q. And did some in-house?

A. Yes.

Q. What's the next project Philip Morris killed?

A. Measurement of radioactive compounds going into cigarettes.

Q. Tell the jury about that.

A. I mentioned earlier that I think it was 1979 and 1980, Dr. Robert W. Jenkins and Dr. Mary Ellen Counts (ph), found that polonium 210 was picked up on the surface of tobacco leaves and about 50 percent of it went in the tobacco, and 50 percent upon the leaf.

* * *

[Tr. 70] A. (The witness complies.)

Q. Tell the jury what that is.

A. When I arrived at Philip Morris in 1976, Philip Morris had applied for and received a patent in 1974, for producing a filter material or a catalyst, if you will, that would, in fact, remove carbon monoxide from smoke.

The unfortunate part of this material, it's a cobalt catalyst, the unfortunate thing was that when it was wet, it wouldn't work very well. When you smoke a cigarette, of course, the smoke coming through is wet, so it would deactivate the catalyst.

The group working for me decided that they would relook at that; and, in fact, produced a catalyst material through which you could smoke 20 cigarettes without it becoming deactivated. And this was actually demonstrated, smoke a pack of cigarettes through it, and I think it is about 1981–82, something in that time frame.

Mr. Wally McDowell presented that idea to the Board of Directors and said, "Well, we could sell this product on the market." It was presented as being one of our major accomplishments for the year, of having taken this [Tr. 71] technology which previously was thought not to work and put into a product.

Now, one of the things about the product that we tested, it wasn't inside the cigarette filter, so this would have been an article that you put cigarettes in, like an external filter, and smoke the cigarettes through that.

The concept at the time was that you would sell one of these with a pack of cigarettes and you would smoke the pack of cigarettes through the filter.

Q. And let me make sure I understand. You thought that would reduce carbon monoxide, right?

A. The evidence showed that it would remove more than 99 percent of the carbon monoxide.

Q. You thought that would provide a health benefit to the smoker?

A. Right.

Q. And you thought it was ready to roll, correct?

A. Right.

Q. And Philip Morris killed it, right?

A. Right.

Q. What did you do about?

A. Complain.

* * *

[Tr. 113] it, that Philip Morris has a financial interest in making a safe cigarette?

A. That is a very difficult question. I don't think that's necessarily true.

Q. Well, let's explore that. 50 million people in this country smoke, right?

A. Correct.

Q. They smoke cigarettes with a warning on the back that says they cause cancer, right?

A. Correct.

Q. If Philip Morris could come up with a cigarette that people liked, that people smoked, that didn't cause cancer or didn't cause most cancers, it would be a license to print money, wouldn't it?

A. No.

Q. Really?

A. The problem is that Philip Morris Marlboro cigarette is the largest selling brand. If you open the door to a safer cigarette, you open the door that your competitors might also sell a different brand. It is not going to be the same as Marlboro; it is not going to taste the same as Marlboro, so Marlboro share might go down like a rock if RJR came out with a safer [Tr. 114] cigarette.

As soon as you have opened the door to safer cigarettes, you've opened the door to Marlboro losing its preeminence as a brand, so that might absolutely kill Philip Morris.

Q. Let's test that, let's test that. You've got 50 million people who are smoking cigarettes right now that may well cause cancer, right?

A. Yes.

Q. In fact, most people believe they do. Wouldn't you agree that most people believe cigarettes do cause cancer?

A. Except for people that work in the industry.

Q. Sure, they hear me say there is a statistical association, they say, "Hogwash." They say it causes cancer, right? They hear me talk about scientific proof versus epidemiology and they go, "It causes cancer," right?

A. I hope so.

Q. I mean, that's what people believe, don't they?

A. I hope they understand.

Q. Yet 50 million Americans smoke, right?

A. Is that 17 percent?

[Tr. 115] Q. It's 25 percent, but if you are not comfortable with 50, let's say 40?

A. Okay.

Q. A bunch of people smoke.

A. Lots.

Q. Now, think of it, if Philip Morris or any company, not just Philip Morris, but Philip Morris is here today, so let's talk about them, could come up with a cigarette that made the nicotine in a cigarette like caffeine in coffee, you get you nicotine hit, you get your caffeine jolt, no health problems, you are on your way, that is an absolute license to print money, isn't it?

A. I still disagree. I'll give you another reason.

Q. Give it to me?

A. Because that's an admission that the product you have been selling before is not safe. It opens all kinds of prospects of litigation that could cost you money.

Q. You know, I've heard that and here is what I was wondering about that. Do you think a jury would be mad if Philip Morris came out and said, "You know what, we were finally able to do it. We can show you how we worked on it. We've

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[Vol. 10-B] [Testimony of William Farone (Mar. 5, 1999)]

* * *

[Tr. 126] A. Yes, he did.

Q. To your knowledge, is that the first time that any agent of Philip Morris has ever made that admission?

MR. COFER: Objection to that.

THE COURT: The basis?

MR. COFER: The objection is that misstates what I said. Second, it is argumentative. Third —

THE COURT: Go ahead.

MR. COFER: Third, the legal significance is beyond this witness.

THE COURT: Objection is overruled. Go ahead.

THE WITNESS: That's the first time I have ever heard that in a public forum.

BY MR. GAYLORD:

Q. To your knowledge, does Philip Morris spend a great deal of money avoiding that admission?

A. Yes.

Q. You wrote some words and some descriptions of projects that were killed by Philip Morris. I just wanted to ask you, were there more that you didn't finish putting on that

* * *

[Tr. 137] BY MR. GAYLORD:

Q. Did the possible consequences in the litigation situation affect what you and your people were able to do scientifically?

A. Yes.

Q. And did it affect, as you could tell, the policies of the company with respect to pursuing safer cigarettes?

A. Yes.

Q. Is the question about financial interest in making a safe cigarette answerable before we know the outcome of litigation against the company today?

MR. COFER: Objection. Argumentative.

THE COURT: Overruled. Go ahead.

THE WITNESS: The company could have made safer cigarettes all the way along.

BY MR. GAYLORD:

Q. Now, Mr. Cofer made the statement this afternoon, is it misleading to tell part of the story and not to tell it all. With that preface, I want to ask you about a quote that was made from an article involving you in the Washington Post.

The quote was, "Boy, wouldn't it be wonderful if we were the first cigarette company to admit" —

* * *

[Tr. 147] And then we heard the term "anti-carcinogen" in this last page.

A. That's correct.

Q. Anti-carcinogen, does that mean that these were in any sense put there to prevent cancer?

A. No. It means that there are some compounds that when you test them have the opposite of causing cancer. They will, in fact, protect cells by some of the mechanisms by which cancer can happen or mutagenesis can happen.

Q. You are referring to the testing of the ingredients individually?

A. Yes.

Q. Philip Morris never put all these things together into the stew and tested it to see if the total smoke of the cigarette caused cancer?

MR. COFER: Objection, leading.

THE COURT: It is cumulative, Mr. Gaylord.

MR. GAYLORD: All right. Thank you.

BY MR. GAYLORD:

Q. In view of the document that we were just looking at, written by Dr. Wakeham, do you have an opinion it was reasonable conduct by a scientist [Tr. 148] in Dr. Wakeham's position to deny in 1976 that there was evidence that smoke contains — causes lung cancer?

A. It is not a reasonable scientific position.

Q. Or Vice President Bowling in 1976 to deny that anything had been identified as an ingredient in cigarette smoke that caused cancer?

A. Again, that's not a reasonable scientific position.

Q. Dr. DeNoble was the subject of some discussions and he wrote some things and used a word "reinforcing agent," rather than "addiction" for nicotine. Do you recall that discussion?

A. Yes.

Q. Do you recall that Dr. DeNoble, in fact, in talking about that subject, has indicated he means by "reinforcing agent" one which would maintain the brain receptor qualities of nicotine?

A. Yes.

Q. And you knew Dr. DeNoble pretty well when he was there?

A. He didn't work for me, but we had — we would meet for coffee and talk things over quite often.

[Tr. 149] Q. Do you have reason to believe that he understood that nicotine was a chemical-dependence causing substance?

A. Well, you know, I went to all the presentations he made. I read the reports. I discussed it with him and his colleagues, and, again, he had an understanding of the effects of nicotine.

Q. Would it have made any sense for Dr. DeNoble to be studying the nicotine analogs for reasons that he and Dr. Seeman were doing it if they didn't believe that the nicotine was the habit-forming substance in cigarette smoke?

A. It's the main pharmacological ingredient, and that's why they were studying the analogs.

Q. The point of the analogs was to get something that would cut down on the effects on the heart, that nicotine was not the cause, while still supplying the drug effect, the hit to the smoker?

A. The pleasurable sensation, yes.

Q. And Dr. Osdene was one of the authors or signatories of one of the documents that supposedly denied nicotine was addictive?

A. Yes.

* * *

[Vol. 11-A] [Testimony of Elizabeth Whelan (Mar. 8, 1999)]

* * *

[Tr. 37] But, jurors, I need to give an instruction about a ruling I have made earlier in the case, and now is as good a time as any to give it to you, and I'll give it to you again at the end of the case.

The instruction has to do with the affect of the warning label on the cigarette packages versus other evidence you are going to be hearing in the trial.

For example, you may be hearing evidence or you may have argument at the end of the case that suggests that Philip Morris failed to disclose the results of scientific test tests or that it failed to conduct certain scientific tests to determine harmful affects of smoking.

Keep in mind that when you hear evidence of this nature that there is no claim in this case that Philip Morris had a duty to disclose to Jesse Williams any information concerning the alleged harmful affects of smoking, other than to provide him with the federally-mandated package warning labels.

Because the Marlboro cigarettes, purchased by Mr. Williams, after September 1, 1988, had the required package warnings, Philip [Tr. 38] Morris satisfied its duty to warn Jesse Williams of the health affects of smoking as a matter of law.

You should not consider evidence that Philip Morris failed to disclose the results of its scientific tests or that it failed to conduct certain tests as any evidence that it failed to warn Jesse Williams of the health affects of smoking.

However, you may consider evidence that Philip Morris made false statements, and you may consider evidence that Philip Morris failed to reveal information where you also

find that Philip Morris made misrepresentations that were half truths or otherwise complete statements.

And you may consider such evidence for the purpose — excuse me. I misread my notes. Let me go back to the beginning of that sentence.

You may consider evidence that Philip Morris failed to reveal information where you also find that Philip Morris made misrepresentations that were half truths or otherwise incomplete for the purpose deceiving the public, including Mr. Williams.

So, when you hear references to the term [Tr. 39] preemption, what that is is a short-hand flag for the rule that the warning label on the cigarette package is sufficient as a warning as a matter of law. There is no claim about failing to warn because of the package label. What you may be hearing is evidence about a failure to provide information or actual misstatements by Philip Morris, and you may consider that for its bearing, if any, on the claim there was deceit of the public, including Mr. Williams. Anything else?

MR. COFER: (Negative response by head shake.)

THE COURT: Okay. Go ahead, Mr. Gaylord.

MR. GAYLORD: Thank you.

BY MR. GAYLORD:

Q. Dr. Whelan, obviously, we are not going to be talking about adequacy of warnings. As we go, just foreshadowing, I will be asking you what you know about the state of science and truth about some of these issues and the relationship between that state and some of the affirmative statements

* * *

[Tr. 61] Pump, which was causing epidemics. I believe it was cholera. And the water coming out of that pump was making people sick, very sick, and he didn't know what it

was. I mean, you know, what they did was they turned the water off, and it stopped the spread of the disease. So, again mechanisms were not in place.

Epidemiology is a very useful tool which can later be verified by biological explanation, but you don't have to say we don't think this is a cause because we don't have all of the i's dotted and t's crossed.

Q. I want to ask you for an opinion, if you hold an opinion to a reasonable scientific probability.

And, by the way, any opinions that you have expressed today should be limited to that standard. In other words, give us your opinion only if you hold it to a degree of reasonable, scientific probability. Will you do that?

A. Yes, I will.

Q. And have you done that so far?

A. Yes, I have.

Q. I'm going to ask your opinion. When did smoking become identified scientifically as the [Tr. 62] major cause of lung cancer?

A. In answering that question, I have to tell you that my answer is a relative one.

By today standards, looking back, I would think that there were — there may have been enough evidence to take cautionary measures by the mid and to late 1930s.

But, being more conservative in my answer, I will say that surely, absolutely by 1957 there was sufficient evidence which had been repeated and confirmed internationally that smoking was the leading cause of, preventable cause of lung cancer.

And I choose 1957, but it's really kind of stretching out there, to try to be really fair about this, but because I believe

that the evidence was in before that sufficient that people should have been told.

Q. What happened in 1957 that gives you that mark in time as a notable one?

A. During, as I mentioned, during the early and the mid-50s, there was a series of prospective and retrospective studies being done in the United States and the United Kingdom, which clearly showed that, as I mentioned, cigarette smoking and lung [Tr. 63] cancer were casually related.

But in 1957, as I recall, the then Surgeon General, I think his name was Dr. Leroy Burney, and he was the head of the public health service, they held a — they released a paper which reviewed the literature at the time, and came to the conclusion that, as an official public health U.S. government public health service statement, that cigarettes cause lung cancer.

During the same year, a similar kind of body in the United Kingdom came to the same conclusion.

I mention that year because it was sort of, if I can use that word, consensus statements were beginning to be formed. These were not individual studies. These were people who looked at all of available literature and said where do we stand now with our knowledge?

And I would say by 1957, it was in.

MR. GAYLORD: Excuse me, Your Honor.

I believe we have an admission in response to a request for admission that Defendant Philip Morris was aware of Dr. Burney's statement at that time. I didn't find it just now to read it, in so many terms.

* * *

[Tr. 66] A. Industry Research Council.

Q. Research Council, TIRC or Committee or Council for Tobacco Research. Which is the other name.

A. Switched names mid-stream.

Q. If I say industry I don't mean other manufactures.

A. I understand.

Q. Those branches. Okay.

A. Uhm-hmm.

Q. Could you give us an overview of the relationship between the scientific truth that had been established by that time and the publications and positions taken by Philip Morris or the industry in the sense I have just redefined?

A. Yes. The timeframe is 1950 to —

Q. 1950 into 1960s?

A. — 1960s.

To my knowledge, Philip Morris did not formally respond to this growing literature on cigarettes smoking and public health and lung cancer in particular prior to approximately January 195for.

In January 1954, Philip Morris joined with other companies to form the group just [Tr. 67] mentioned, the Council for — the research council regarding cigarettes and health, and took out a full-page ad to announce the formation of this research committee which were to be funded by a number of different cigarette companies.

And this ad, which is now known, which was known, was called the Frank Statement. I believe it was published — I don't have all of my notes here. I'm working without notes. But I think it was January 4th, 1954.

And, to my knowledge, this was the first public statement made by Philip Morris that I know of, and they made it as part of this consortium with other companies.

And this Frank Statement, in my opinion, is anything but frank. You asked me to relate their public stances with the literature in the hand; and, as I have already mentioned, by January 1954, there was an extraordinary amount of evidence linking smoking and linking cancer.

And that came from those clinical observations I mentioned, the '30s and '40s and the retrospective studies which had already been published in 1952 and the prospective studies which were actually published I think just shortly after [Tr. 68] this but the results were already leaked out.

So, for this Frank Statement, which basically says there's no evidence that smoking causes lung cancer, is completely out of line with what the knowledge was at the time.

Now, what's even more extraordinary about this Frank Statement is the way it begins. It begins by calling attention not to the human studies, which they have described to you, but talking about these rodent studies of the painting of the skin and the tar. And that is how this so-called Frank Statement begins.

I think the thrust of it was to say hey, it says, smokers, non-smokers, whoever. It was placed in newspapers all across the United Stateson this day. And it was distributed copies to, you know, thousands of doctors and politicians. It was the official statement of the newly formed consortium of cigarette companies.

Basically, it said that they know of no evidence, but that they would put in money to research to see if there is evidence. And I think the implication of this ad is, if there's ever any evidence that smoking causes lung cancer, we'll let you know.

* * *

[Tr. 78] been discussing.

This is Exhibit 10, Plaintiff's Exhibit 10. It's dated March 31, 1954 from the Oregonian.

I'm corrected. It's from Pacific News Source. I beg your pardon.

And it's a publication that says March 31, 1954, the cigarette industry would, quote, "stop business tomorrow if it thought its product was harming smokers, according to George Weismann, Vice President of Philip Morris & Company, in a speech in Chicago Tuesday. He blames the cancer problem on medical propaganda by a small number of doctors and a large number of magazines and newspapers."

I want to focus on that last part.

Medical propaganda is a — well, it's a phrase that I suspect you would be familiar with based on what you do and what your organization is all about?

A. Yes, I'm familiar with it.

Q. Was it a frank and fair description of the smoking and health issue in March of 1954 to label it medical propaganda?

MR. COFER: Objection. Leading.

Argumentative.

MR. GAYLORD: I'll rephrase.

[Tr. 79] THE COURT: Go ahead.

MR. GAYLORD: Thank you.

BY MR. GAYLORD:

Q. How would you characterize this characterization using the phrase medical propaganda in relation to what was known about smoking and health at that time?

A. I would characterize it as absurd.

Again, as we have discussed or I have discussed, there was a vast medical literature at this point of studies of human

beings, smokers and non-smokers. This has nothing to do with propaganda of the kind that would be made up with no data at all.

I also find very interesting, if I might say, that the quote of Mr. Weismann that we will give up basically marketing cigarettes if they are harmful to health.

Starting in 1954 and continuing on through today the Tobacco Institute and the individual companies have maintained that there's no evidence, the evidence is not there, but they never set out what criteria they would accept.

Even in this particular quote. He seems to say well, if it was harming us, harming people, [Tr. 80] we would withdraw it, and it's all propaganda.

But what evidence is lacking, Mr. Weismann? Or what criteria are you following whereby you are rejecting the current data but that you would accept some unknown data? That has never been set forth by the trade association for the cigarette companies or by the companies individually.

Q. Since you bring up that subject, have you pursued the answer of the Tobacco Research — TIRC/CTR or the Tobacco Institute? Have you sought their answer to the question what research would convince them that their product was harming smokers?

A. Yes, I have pursued that, starting in the early 1980s. I wrote a number of letters to the president of the Tobacco Institute. Basically, that this letter said — his name, by the way, was Horace Kornegay.

And I asked Mr. Kornegay, I said, I have noticed that you folks say that 60,000 plus studies in the medical literature linking smoking and disease are insufficient and that they don't prove any cause and effect.

I asked him by what standards do you

• • •

[Tr. 91] is being observed.

Q. Can you characterize, based on your study of this subject, how Philip Morris and the public relations and, quote/unquote, research organs of the tobacco industry dealt with the issue of smoking and health from the time of the Frank Statement forward? Is there a pattern or a strategy that is discernible from what they did?

A. The pattern, particularly of the Tobacco Institute and as the public spokesman for the cigarette industry, was the same as it was in 1954, to say that there was no evidence that smoking caused lung cancer, and then later they deny other diseases as well. That denial has continued up until the present day, including testimony before the U.S. Congress.

Q. Are you familiar with the research work and the research funding of the TIRC and CTR as it proceeded? And I'm not going to ask you in great detail. But as a general overview are you familiar with the kinds of things they engaged in and what kinds of research they have promoted?

A. Yes. The Tobacco Research — the Tobacco Industry Research Council, which was announced in the Frank Statement in January 1954, said it was

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[Vol. 11-B] [Testimony of Elizabeth Whelan (Mar. 8, 1999)]

* * *

[Tr. 23] little bit closer to home.

This is a 1964, January 12, 1964 story appearing in The Oregonian here locally. I believe that's the day or the day after the publication of the Surgeon General's Report of 1964. The topic is, new tobacco report designed to go beyond peril of lungs. The Oregonian has cited spokespersons from the industry, particularly from Philip Morris — I'm sorry Tobacco Institute. Beg my pardon.

MR. COFER: What's the exhibit number?

MR. GAYLORD: 161.

BY MR. GAYLORD:

Q. "The tobacco industry claims, however, that a causative connection between smoking and impaired health has not been proved."

Was that a valid scientific statement on January 12, 1964?

A. It is not.

Q. "In a detailed report released Thursday at Greensboro, North Carolina, the nation's tobacco companies claimed the vast majority of smokers suffer no serious impairments of health or shortened life."

Let me ask you, Dr. Whelan, with respect [Tr. 24] to that statement, is that relevant and significant to the question whether smoking cigarettes causes lung cancer?

A. It is significant in the sense that it misrepresents the knowledge at the time.

Q. It is not true?

A. It is also not true.

Q. Does the — would the fact that some smokers do not suffer serious health consequences in any way negate the findings of the epidemiology and the science published as of this date?

A. The answer is no, but I must say I am a bit confused as to how I should answer a question like that. Should I just say no, or should I — I don't want to give a speech which obviously I was criticized before. But I feel no is not a sufficient of an answer.

Q. Why do you say no?

A. No. Because we're looking here about increased risk. The fact that every one does not get the disease in question does not negate that it is a very powerful cause of the disease.

Q. In the field of epidemiology and public health, is it common for causes of disease to be less than universal in their effect?

* * *

[Tr. 30] MR. COFER: Objection, lack of foundation. What sources?

THE COURT: Rephrase, please.

BY MR. GAYLORD:

Q. We've talked about several sources so far of the information that the industry was publishing, which showed examples of — and some information that the Philip Morris company had internally, and just without any more than that, I will ask you, can you answer the question, did the Reader's Digest article or other public press releases overcome the impact of the false controversy building effort of Philip Morris and the industry, public relations.

MR. COFER: Same objection.

THE COURT: Overruled. Go ahead and answer.

THE WITNESS: The Reader's Digest articles were the exception to the rule. They were — there were very few magazines that covered the dangers of smoking and, no, there were few publications did not any way meet or overpower the denials from the industry.

BY MR. GAYLORD:

Q. Dr. Whelan, are you familiar with the

* * *

[Tr. 51] reasonable consumer aware of the information this witness was aware was available.

BY MR. GAYLORD:

Q. Make the same assumption, Dr. Whelan. And the question I'll ask you, do you have an opinion, to a reasonable scientific probability whether the cigarettes that Jesse Williams smoked were dangerous beyond the contemplation of an ordinary consumer under these circumstances?

A. I have heard the argument that people should be responsible for their own behavior. That requires information. And I will answer your question by saying I do not believe that there was sufficient information out and made available that that informed decision ever took place.

Q. When Philip Morris has disclosed publicly positions that the proof was not in on the question of causation of lung cancer, you've told us a good deal about what you believe the medical science and proof was during these relevant periods of time.

Let me ask you a couple of different details about the state of scientific knowledge whether Philip Morris made those statements. First, what has been known in medical science

* * *

[Vol. 12-A] [Testimony of James Kern (Mar. 9, 1999)]

* * *

[Tr. 118] A. There was a tumor within the airway, and it was biopsied and found to be a lung cancer.

Q. Now, on I'm looking at a page of your, again, you dictated notes on October 11, 1996.

A. Okay.

Q. Do you have that?

A. Yes.

Q. And that is further follow up of all of this process in a dictated report by you, but there's handwriting on the bottom corner of that?

A. That's correct.

Q. Is that your handwriting?

A. Yes, it is.

Q. And does that indicate that you, by that time, you received a preliminary pathology report from the biopsy?

A. Yeah, I can't say whether I actually received. The note doesn't say whether it was through conversation with Dr. Turner, he had called me with the results, or whether I had actually seen a biopsy, you know, the official pathology report. But I indicated that it was what I call the squamous cancer of the lung. And that my other notation there was I was going to keep him on medication to try to continue to help reduce.

* * *

[Tr. 121] Q. Okay. Now, as the primary physician diagnostician in this case, did you form any conclusions about whether this was a type of cancer that was known to be caused by smoking?

A. Yes, I did.

Q. Did you form an opinion to a reasonable medical probability whether Jesse Williams' lung cancer was caused by smoking cigarettes?

A. I believed it was.

Q. And now subsequently in March of 1997 Jesse Williams died. And you have, I see in your hand, a copy of the death certificate?

A. I do.

Q. And in the interim time between October of '96 and March of 1997, did you continue to have an active role in his care?

A. I did not have an active role in his care. I had referred him to, after this diagnosis, to one of our medical oncologists or cancer specialists for treatment.

Q. Who's that?

A. That is Dr. Gerald Segal.

Q. He's one of your partners and his specialty is the treatment of cancer after they are diagnosed?

[Tr. 122] A. Yes.

Q. All right.

By the way, had you ever discussed smoking with Jesse Williams?

A. On occasion, we discussed smoking with him, yes.

Q. I'm aware of a note, I think we talked about it already, on the June 27, 1996 chart entry. I have got the right one. You said he was a smoker of one and a half packs a day. And then I think I was mixing that up with the other one.

A. Might be — well —

Q. I'm not seeing exactly which one. It was one of your dictations, and I'll find it. It indicates that he had difficulty quitting smoking.

A. There was a mention on June 27th, 1966 that I encouraged him to stop smoking. He would seriously consider that. That is one that I see.

Q. Okay. My question about that is just this. We have heard suggestions in the case here about what physicians do with respect to patients and smoking.

Did you always routinely, without fail, discuss quitting smoking with Jesse Williams?

A. I don't say — I can't say that every [Tr. 123] visit I routinely discussed quitting smoking. I think my usual style would be to periodically bring that up visits. And I may or may not spend a lot of time doing that at my particular visit. And it may or may not be reflected in charting, depending on how much emphasis was placed on that during the visit to the physician.

Q. Generally speaking, if you pursued the subject with a patient like Jesse Williams of trying to get him to quit smoking or talked about efforts to quit smoking, to put serious emphasis on it on a given visit, would that be reflected on your charting for that visit?

A. I believe that is a fair statement.

Q. Did you make any observations from the sources available to you about the aggressiveness of Jesse Williams' cancer?

A. Well, I felt that his big difficulties began in 1996 with this, and that it was looked for with some x-rays early in 1996 and it just couldn't be ascertained at that point that it was there. And it appeared in an aggressive way later in 1996. So, I felt that really things came to light during that time in a fairly quick way.

Q. Have you formed an opinion, to a [Tr. 124] reasonable medical probability, whether the cigarettes that Jesse Williams had smoked during the preceding eight years before his diagnosis was a substantial contributing cause of the cancer and his death?

A. I believe they were.

MR. GAYLORD: Thank you, Dr. Kern.

THE COURT: Cross-examination.

MR. SIRRIDGE: Yes. Thank you, Your Honor. I was going to take a couple a minute or so to set up.

THE COURT: Sure.

MR. SIRRIDGE: Sorry we didn't figure this out before.

THE COURT: Are you going to need the witness down near the monitor?

MR. SIRRIDGE: It's possible, but he has his own chart with him so that probably will not be a problem.

May it please the Court.

THE COURT: Certainly. Go ahead.

* * *

[Vol. 12-B] [Testimony of Mayola Williams (Mar. 9, 1999)]

* * *

[Tr. 27] A. So yes.

Q. So what was he, a sergeant?

A. Yes, he was a first sergeant.

Q. Okay. Now, when you met him, had been overseas yet?

A. Yes.

Q. And did you learn about where he had gone in the world while he was in the Army?

A. Yes. He told me a lot about his Army career.

Q. Okay. Well, tell the jury which countries he had been to.

A. He first — after he left Texas, then he went to Fort Knox. Is that in Georgia, I believe? And then he went to California. And after that, he was shipped over to Japan.

Q. Okay. Did he also go to Korea?

A. Yeah. After he stayed in Japan for about a year or so, then he was in Korea, in Seoul, Korea.

Q. Now, of course, we know what this case is about, and it has to do with smoking. So how was it that he came to become a cigarette smoker in Korea?

A. Well, he was part of the — part of the [Tr. 28] artillery part of the Army there. And that meant that at night they had to stay on guard and guard the artillery. So there was — it was a lot of mosquitoes; and, you know, just very bad condition there.

So the Red Cross gave cigarettes. In fact, they gave Philip Morris cigarettes to the soldiers to smoke — I mean to the Army and the Army gave them out to the soldiers.

Q. And was he given Philip Morris cigarettes?

A. Yes, he was given cigarettes to — cigarettes to keep the mosquitoes off of him. I can say this, if you don't mind — I'm going to add that Jesse would never have smoked cigarettes if he hadn't been given the cigarettes while he was in the service, because he was 19 years old when he went in the service.

And I believe his brother had sneaked around and started smoking, because their family wasn't smokers that I know of, and that he was not, you know, he didn't do it. He didn't do anything like that.

Q. So was it correct that he didn't smoke back when he was on the farm, but when he left [Tr. 29] home is when he started?

A. That's right.

Q. Okay. Now, by the time that you met him, was he smoking cigarettes regularly?

A. Yes, he was.

Q. Okay. Now, I remember when we were sitting here, and I showed Dr. Pollay one of the ads — I don't know whether you can see it. It is not a great picture, but it shows the Philip Morris cigarette. Is that the kinds of cigarette that he smoked back when you met him?

A. Yes, that is the kind he was smoking.

Q. Now, just to give a little, I guess, education to the jury, are you a cigarette smoker?

A. No, I'm not.

Q. Have you ever been?

A. No, I have never been.

Q. Okay. Do you like cigarette smoking?

A. No, I hate it.

Q. Okay. Did you hate it back when you lived with Jesse Williams?

A. Yes, I did. Not at the beginning.

Q. Okay. But as time went on, and we're going to go through that as we go through the afternoon, what was it that led to you falling in [Tr. 30] love with and deciding to marry Jesse Williams?

A. Well, he was just a very nice person, and I noticed one thing about him, that he liked children a lot, because I had younger sisters and brothers, me being the oldest of my family. And he was always, you know, playing with the kids. And he was just kind of a very nice person like that. And we dated, so I just grew to fall — grew to love him, you know.

Q. Did he want to have a family?

A. Yes. We talked about that.

Q. Was there a period there where he was at Fort Lewis still and you were down in Portland where the two of you wrote love letters back and forth?

A. Yes, uh-huh.

Q. And then did he eventually move here to Portland, rather than you going back to Crockett?

A. Right.

Q. Okay. Now, I don't want to spend a whole lot of time on background things, but what I would like to do is to give the jury sort of an introduction to who Jesse Williams was back in the '50s.

After he got out of the service, did he [Tr. 31] work a series of different jobs in the Portland area?

A. Yes, he did. When he got — we got married before he got out of the service. And when he got out of the service, well, we — he had taken his money that he had, and we paid down on a home, and that's where we started our family. And he worked several jobs at that time before he got a job working for the City.

Q. All right. Now, when he was — and I'm just going through the '50s — was he somebody who liked sports and athletics and things like that?

A. Yes.

Q. And did he look at magazines and look at some of the ads in the magazines at your house?

A. Yes, he saw ads like — similar to those.

Q. I don't know all the names here, but, for example, here's one in — I think the name is Joe DiMaggio.

A. Yeah, I see that. Yeah, we saw that.

Q. Did he like to look at the — did he like to look at the baseball games and basketball games when he had the paper and the scores were in the paper and that?

A. Yes. That's the most of the part of the [Tr. 32] paper that Jesse read was the sports ads. I mean, that's the most part of it he read.

Q. At some point, did he begin smoking the Marlboro cigarettes?

A. Yes.

Q. And the Marlboros they were — when they came out, they were in a red and gold pack?

A. I think so.

Q. Did he buy the packs or did you buy the cartons or how was it that you got the cigarettes?

A. Well, in our early years, I bought cigarettes with the groceries when I'd go grocery shopping, so I would buy them by the carton.

Q. What I would like to do is to kind of give the jury as we go through this today an idea of what amount of cigarettes he smoked back in the '50s. And you know, to the extent that you can tell them, and I don't mean exactly, but to the extent that you can, when the Marlboro — when he first started to smoke the Marlboros, how many cigarettes a day was he smoking or how many packs a day?

A. He was smoking about a pack a day.

Q. And just to kind of look forward for a minute, did that amount change over time?

* * *

[Tr. 38] and peritonitis by the time he went to the Portland School District?

A. Oh, yes.

Q. Okay. And was that in about 1980 or somewhere in there?

A. Yeah, around 1982 or somewhere like that, he started working for the School District.

Q. So was it — would it be fair to say that during that time period the appendix and peritonitis were not health problems for him?

A. There was quite a few years before he started in the School District. They weren't a problem anymore.

Q. Okay. And did the family live in Portland this entire time?

A. Yes, we always lived in Portland.

Q. And was it the Southeast/Northeast Portland area pretty much the whole time?

A. We lived in Southeast probably half of the time, and the other half in the Northeast.

Q. All right. Well, over the time when he was in the '60s and in the '70s, did he still smoke Marlboros or was he smoking some other brand?

A. He was smoking Marlboros. He smoked them

* * *

[Tr. 40] defense lawyers are going to ask you questions in a little while, and it isn't really an environment that maybe makes it easy to have a one-on-one conversation.

But I've had some conversations about what he said to you before, and that's an introduction to the question of, could you, please, as close as you can, give us the words that Jesse would say — Jesse would say when you would tell him that you thought he was smoking too much.

MR. DUMAS: Excuse me, Counsel. I apologize. A brief matter for the Court.

THE COURT: Sure.

(Sidebar conference between Court and counsel, off the record.)

BY MR. THOMAS:

Q. When Jesse Williams got to the point where you said anything negative about cigarettes and him smoking them, could you tell the jury what it was that you'd say, and what it was that he would say?

A. I would tell him, "Jesse, you smoke too much," you know. "It's is not good for you to [Tr. 41] smoke so much." and he would say to me, "Boy, forget it," or, you know, "It's not smoking too much." And later on when I found out and

discovered that from reading and watching the television and things like that, that tobacco was dangerous to your health, so I started telling him those things.

And that's when he would really get upset with me and say things like, "Oh, shut up, honey. You don't know what you're talking about," he says.

I would tell him such things like I said, "Well, you know that you hear what the Surgeon General says about smoking, that it's too bad for you, or you even hear other comments about it."

And he goes, "Well, the tobacco company, they never said that anything like this is going to harm you. They never said there was anything wrong with the tobacco." and he said, "The Government is always saying stuff about something, tobacco or something is going to cause you to have cancer."

And he said, "I don't believe it, because the tobacco company just would not do that."

[Tr. 42] Q. Now, what point was it that you began to say that you thought that he was smoking too much, and you wish he would quit, about when was it?

I want to give the jury kind of a bookmark, and then we're going to go forward in time and talk about how things developed.

A. The most part of the time started in the late '80s, and then in the '90s. That's when it got to be the worst part.

Q. Well, all right. Well, I want to go back to the '70s.

A. Okay. I started in the '70s telling him about it.

Q. Okay. Now, tell the jury about what level of smoking in terms of how many cigarettes a day was he smoking back in the '70s?

A. He started smoking around about a pack and a half a day and it gradually got to two packs. And then I'd say about ten years or eight years before he died, it was three packs.

Q. Okay. Now, let's go back to the '70s, because I'm going to try to stay with that for a minute. Did you ever, in the '70s, show him the warning label that was on the cigarette pack or read it to him?

[Tr. 43] A. No, I never did, but I told him about it.

Q. And what did he say when you showed him — or told him about it?

A. He would just go, "Phooey." You know — you know that's not — "This is what the Surgeon General says, it's not what tobacco company says."

Q. Did you ever talk to him about what the label actually said?

A. Yeah. Back in the '70s, it said that it was dangerous — it could be dangerous to your health.

Q. And what did he say about that?

A. He would say things — he would get angry about — he goes, like, "Well, I been smoking these many years and blah, blah, blah, and it hasn't hurt me yet. I'm not sick or anything yet, so what are you talking about?"

Q. Was he the kind of person who got irritated that fast, that quickly, about other things besides cigarettes?

A. No. Our most arguments were about cigarettes. That's the most arguments, because as the years went by, I got so that I just hated cigarettes, and I thought that cigarettes was taking the place of some of my time with him, [Tr. 44] because he spent so much time smoking that he had to, you know, interrupt our pleasure times together to take a smoke.

And I would just, you know, would be always upset, and so I would jump on him about it. So he would get angry, he'd walk out and all those type of things.

Q. Now, you said something that I want to go back to: "Take a smoke." Where did that term come from?

A. That's what he would do whenever he — like we — whatever we were doing, you know, like even if the kids came over, this is after the kids got grown up.

Q. And I want to stay back in the '70s?

A. Okay. All right. Well, whatever we were doing, and whatever we'd do, and he had a time he would have to smoke. He would just say, "I got to have — I got to take a smoke. I got to go out and take a smoke."

Q. And if the family was involved in a fun activity, or in a not-fun activity, would he leave whatever was being done to go out and take a smoke or have a smoke?

A. Yes. He would cut the games. We used to [Tr. 45] play lots of games and things like that. And he would cut the game short to go take a smoke. Or when we — we would go fishing a lot. He would do that, you know. He would smoke while he was fishing.

And my thought — I had a thought it just — I can't think about some things that we did together, that he would start to smoke. It was just — it is upsetting to me to think about it.

Q. All right. I'm sorry to do that.

A. Okay.

Q. I've got to ask you about these things, though. You know that?

A. Yeah. Well, it's just something there that, you know, it kind of upset me to think about it.

Q. Okay. Are you okay to keep going?

A. Yes.

Q. All right. When was it that he began to, if ever, talk about quitting smoking cigarettes?

A. He starting talking about it in the '70s, you know. He would say he would quit, you know. He didn't — he wasn't committing himself to right there about quitting, but he would say that he was [Tr. 46] going to quit or he would try to quit, and then sometimes he did.

Q. All right. Now, what I want to do, and again, we're going to try to stay in the '70s. As near as you can, tell the jury what it was that he would try to do to quit and how it would go?

A. Well, when he — when he was first starting to try to quit, he would try smoking the cigarettes that are supposed to have less tobacco or nicotine in it or whatever that was causing people to have health problems. Like he would smoke the Marlboro Lights, or something like that.

Q. All right. Now, did he buy the Marlboro Lights when they became available, the ones in the gold and the white pack?

A. Yes.

Q. And the pack that you got me was the Marlboro Light 100s. Those are the long ones. Are those the ones that —

A. Yeah, he liked the long ones better.

Q. Okay. And so one way that he did it was to smoke cigarettes that were supposedly the lighter cigarettes?

A. Yes.

Q. Did he still — did he try to smoke fewer [Tr. 47] cigarettes?

A. Yeah, he tried to cut down on cigarette smoking.

Q. Tell the jury what would happen when he tried to cut down on cigarettes.

A. Well, it wouldn't last very long, you now, he — oh, like sometimes he would tell me, "Honey, today I only smoked three cigarettes," and then maybe tomorrow, like, if he had started, "Well, I only smoked five today." And I said, "Well, honey, you're not getting better; you're getting worse again." And then before the week is over, he was back smoking the same amount.

Q. And would you say when that happened?

A. Yeah. I would ask him, "Well, what's your problem? I mean, why can't you — why don't you just stop, you know? Why did you start back?"

And he'd go, "Well, it's hard, honey," he said, "It's very hard. I just, you know, I just can't." And he would always be nervous and irritable, and so that's why he was smoking.

Sometimes he would yell at me a lot. And then he would say — and then he apologized, and he would say, "Well, honey, I'm sorry, but you know, I need a cigarette." Or, "I have to smoke."

[Tr. 48] And then, you know, and then, "I don't mean to be mean to you, but I just get like this sometimes when I have to have cigarette."

Q. All right. Now, I would like to go a little bit back to the '60s to television. We heard some testimony about television. What kind of television shows did Jesse Williams like to watch?

A. The earlier shows, we liked — he watched — we both liked to watch them. We watched shows together mostly, but we watched, like, Dr. Ben —

Q. Casey?

A. — Casey, yeah, and Dr. Kildare. Saturday Night Live.

Q. Did he like —

A. Cowboys. He loved the cowboys. That was his show, when it comes to cowboy movies coming on, he watched those.

Q. Did he watch the weekly cowboy movies like Rawhide?

A. Oh, yeah. And there was a couple of other ones back then. I can't remember the names of them, like maybe Maverick, or something like that, The Virginian, those type shows.

[Tr. 49] Q. Okay. And as far as his interest in sports through the '70s, did he continue to be interested in sports?

A. Yes, he did, always.

Q. Did you in the '70s and the '80s just give up on having him quit or did you keep the pressure on him?

A. No, it got worse. The arguments, the pressure, the temper tantrums that he would have, all those things got worse.

Q. All right. What I'd like to do is to give the jury kind of a bird's eye view of what would happen when you would have a conversation about cigarettes with him, what he would say and what you would say.

Now, you told us some things, so I don't want to go back and start all over again, but as time went on, what kind of things would you say to him and what would he say back?

A. Well, it — the arguments were basically the same. The stands was basically the same, you know. Like he didn't believe that cigarettes was harming him and I believed that they were. And I kept telling him this.

And he would get angry and storm out, or [Tr. 50] swear at me sometimes and give all kind of excuses to why the cigarettes wasn't harming him.

Q. Did he sometimes show you things from the paper to show that there was not sufficient proof about cigarettes being bad for you?

A. No. He never did show me anything from the paper, but he had quoted some things to me that he had heard tobacco companies saying, that tobacco was not addictive. He told me that.

And he would say, "Well, honey, you see I told you this — I told you that tobacco wasn't — cigarettes are not going to kill you, because I just heard this so-and-so guy on TV, and he said that tobacco doesn't cause you cancer."

Q. Well, was he in a position where when you had a discussion about it, it was kind of like a conversation where his mind wasn't made up?

A. To stop smoking?

Q. Well, about whether — what he heard was correct or not; in other words, was he completely open minded about it or did he have his mind made up?

A. Oh, he was — he just thought that was the truth. He believed it. That was Jesse. Once he got an idea or belief in something, it was [Tr. 51] very hard to change, and he just did not believe it. It would have to be proven to him, in fact, to change his idea once he got an idea, or he got a belief in something. You couldn't just tell him or show him. It had to be proven, literally proven, to him.

Q. What about the '80s? You said that in the '80s that he went up to — I think you said three packs a day, two to three?

A. Well, it was about — it was about the late — the late '80s or middle '80s.

Q. And is that when he was smoking the Marlboro Light cigarettes?

A. Uh-huh, yeah. That's when he was smoking them more then. He was almost smoking them — for a while there, he was smoking them all the time, you know, like most of the times.

Q. How often would he try to quit or slow down?

A. Uh —

Q. And by this I mean in the '80s?

A. In the '80s, he tried more frequently in the '80s to stop — trying to stop smoking. And then in the late '90s, the he did before, because there was aid to help him, like gum or patches, [Tr. 52] and he tried those things.

And he even talked about getting — being hypnotized to try to stop, but he never did — I don't think he ever got that far. But he, you know, he talked about it. He would go cold turkey at times.

Q. Tell the jury about what it was like when he went cold turkey.

A. It was horrible. He didn't eat very much, and he would be so angry just all the time, like, I didn't have very much to say to him or talk to him, because he would be too angry to talk to him about smoking.

In fact, he had — well, you know, our conversation would end pretty soon, because he is going to be storming out of the house or just be very angry with me.

Q. And then when he went back to smoking again, would be go back to his usual behavior?

A. Yeah.

Q. Did he ever have in the family a child who was smoking and he let them know about whether he thought they should smoke or not?

A. Yeah, when they — when they were young. Calvin was the one when he was a young teenager, [Tr. 53] maybe about 14 years old, he caught him smoking once, and he just got a broom or something, and he just chased him out.

I remember, I was at the beauty salon. It was kind of terrible and also funny, because Calvin come running down wanting to know where I was. He was scared do death of his dad. He came running and he said, "Mama, Daddy is going to hit me with the broom."

And I go, "Well, why was he going to do this to you?

"I was smoking. Me and Nano (ph) was smoking and he got the broom, and he was really going to hit me with the broom."

Q. So he made an escape?

A. Yeah.

Q. And Calvin was the baby of the family, right?

A. Yeah.

Q. Okay. In the '80s, did he begin to get like a smoker's cough?

A. Yes, very, very bad.

Q. And would it be something where he would be clearing his throat a lot or how would that be?

A. Well, he did — he cleared his throat a [Tr. 54] lot, but he got so he would just cough. He coughed all the time. I mean, he would cough — he would cough so badly until I was — I was scared, you know, he was going to die from the coughing. That's how bad his cough would get.

And then that's when I would start sending him to the doctors. And that's when he started going to Dr. Kern and — to get medication, because he would cough so much. And then he would wheeze a lot.

And he would spit up, not just blood, but it would be — I mean, terrible-looking stuff, all black and greenish stuff. He was always spitting that stuff up at night. And he would spit up, almost as much as a half a cup of this stuff like that, and it was really frightful to me.

But when he went to the doctor, that's why — he never, you know, I don't think he ever told the doctor the extent of his coughing and the problems, because the doctors would only give him — they would send him back, and he would say, I asked him "Honey, what did the doctor say?"

And I knew there had to be something terribly wrong with him. He would say, "Oh, they didn't say much. He didn't say much. He said I [Tr. 55] was okay. I just have a little cold." And this is the type of way he accepted it.

Q. Was this the time when he would have what's been called the chronic bronchitis where he would have the upset chest cold and that?

A. That was during the time, yes.

Q. Did you go through times with him where he was sad about being unable to quit smoking cigarettes?

MR. DUMAS: Objection.

MR. THOMAS: I'm sorry. Let me finish my question and maybe I can avoid the objection.

MR. DUMAS: Thank you.

BY MR. THOMAS:

Q. Before he got diagnosed, were there times when he was sad about being unable to quit smoking?

A. Yes.

Q. Tell the jury what he would say when he was sad about that.

A. He would just say, "Well, I wish that I could stop." Because I would be telling him the things that's going to happen to him, that you are going to cough yourself to death.

And that, you know, "Well Honey, you're [Tr. 56] killing yourself, and not only are you killing yourself, you're harming me," because I had to go to the doctors I don't know how many times for eye infections, and that was the date the doctors told me that it was due to the effects of smoke from the cigarettes.

And so I would complain about these things, and he would feel bad about it. He said, "Honey, you know I don't want to do anything to harm you. I wouldn't try to do it intentionally, but I just, you know, I just can't stop smoking."

Q. Did he begin smoking outside?

A. Yes, he did.

Q. Was that partly at least to avoid having you have bad health effects from it?

A. Yes. He first began smoking — we always went someplace together. We was always on the road. And he first started smoking — stopped smoking in the car.

And then we would go where he'd have to pull over to get out to take a cigarette, you know, to smoke. And so we — and he would do this so often on our trips that we would take — so I started telling him to designate a place where we were going to stop, you know, so he wouldn't have [Tr. 57] to just get out on the side of the road to smoke. And so we would stop at different places and go in so he could have a smoke.

And then later it got, you know, that we were — it was just really bad in the house. And he would go in the basement and try to smoke there, but the smoke would still come up through the vents. And it would make the house smell and it was just terrible. So I'd keep, you know, on him, and so he finally ended up going outside.

Q. And I'd like to talk with you about some things that happened with Jesse Williams and cigarettes. Sometimes when he would cough in the night, would it wake him up?

A. Definitely.

Q. And if he got woken up, would he be able to take a drink of water or something and go back to sleep right away?

A. No. Jesse would wake up coughing so hard, it would just make me almost go into tears now, but I won't. He would —

Q. Do you want to take a minute?

A. Yes.

Q. All right.

A. Just a second. He would wake up coughing [Tr. 58] so hard, and then instead of him taking a drink of water and going back to sleep or something, he would get up, put his robe on, go out in the cold and smoke the cigarettes.

THE COURT: Would this be a good time for the afternoon recess?

MR. THOMAS: Yes, ma'am.

THE COURT: Let's take 15 minutes.

Leave your notes here, please. Don't discuss the case and watch your step coming out.

(Whereupon, the following proceedings were held in open court, out of the presence of the jury:)

THE WITNESS: I'm sorry.

THE COURT: It's okay. People expect it's going to be hard, and you don't need to apologize to people. You just let us know what we can do to help with it. All right?

THE WITNESS: Thank you.

MR. TAUMAN: Your Honor, I believe that at the end of the day, we will have some transcripts to deal with if we have the time.

* * *

[Tr. 71] before he stopped smoking — before he stopped smoking in the house, he would have it while he was in bed, as soon as he would wake up.

After he stopped smoking in the house, when he gets up, he takes a cigarette — a couple of cigarettes, in fact, and then he came back and washed up and then he would go out to have more cigarettes.

Q. When he would smoke the cigarettes outside, would anybody from the neighborhood join him or would he be out there by himself?

A. By himself, always.

Q. After he retired in '91, did he continue to try to quit smoking?

A. After he retired from the school district?

Q. Right.

A. Yes. That was during those years — that was the times when he tried most to try and stop smoking.

Q. I think we heard a reference to him getting Nicorette gum, the nicotine chewing gum.

A. Yes.

[Tr. 72] Q. Did he try that more than once?

A. Yes.

Q. What about patches? Did he try that?

A. Yes, he tried that, too.

Q. Tell the jury how well those things worked for him when he tried to quit or slow down with those products?

A. Well, Jesse, he would — he would try for a day or so. And he would cut down a few cigarettes. And then sometimes, like, with the patches, he would, you know — I don't know the routine of how they worked because I can't remember, but he would smoke while he had the patches on sometimes. He would have the patch on, and he would still have to have a smoke with the patch on.

Q. Did he ever talk to you about it or did you talk to him about it?

A. Yeah, because I know that he was supposed to have the patch on, and I would see him smoking, and I would go, "Honey, didn't you put the patch on this morning?" So then he goes, "Yeah, I got it on," you know.

Q. And what about him being able to go along without a cigarette? What about that?

[Tr. 73] A. He couldn't. I mean he couldn't — because he would still be smoking, and he had it on.

Q. Did the time come when he quit using the gum or quit using the patches?

A. Yeah.

Q. Was there any conversation about that?

A. Yes.

Q. Tell the jury about that.

A. Oh, I would just be upset with him and tell him, you know, he should try harder. And that he should, you know

— maybe he could stop if he would try harder. And he said that he was trying as hard as he can, but he just can't stop. He wanted to. But he just couldn't. He said that, "You just don't understand, Honey. You don't understand." He would say that lots of times.

Q. "You just don't understand?"

A. Yeah.

Q. Okay. What I have done for the last couple of hours is to focus you and everybody on what I think you said was the biggest problem for

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[Tr. 77] period. And I didn't want any ashtrays in the house because they're filthy and just a mess.

So I would throw out the cigarette ashtrays, if he brought one home. Because he would sometimes just bring a cigarette ashtray home for himself to smoke because I didn't buy them.

So I would throw it out. And sometimes it would find its would find its way back into the kitchen, and I would throw it out again. And it found its way out in the garage. And that's finally where they stayed.

Q. Did you ever have a conversation with him about the word "addiction"?

A. Yeah.

Q. And can tell the jury about when it was?

A. Well, this is getting pretty close to before he got — it was during the '90s. And especially about around '94 or '95, '96. These are the times when I was really on him about it.

And I knew that they were addictive. And so I would tell him — I told him things. I would say things to him like, "You smoke like, you know, like those cocaine people.

That's just how you treat your cigarettes, like you are addicted [Tr. 78] to — like a drug addict or something."

That's what I would call him, and he would get awfully angry and say, "That's not true," and said "I've been smoking for like 40 years or 50 years." He didn't exaggerate the years that he smoked, "And I don't have nō nothing. I don't have no cancer. I don't have no heart problems, and I'm as strong as a younger man," and all that kind of stuff like that.

Q. So did he buy the addiction theory?

A. No, he did not.

Q. Okay. You see pictures of people in the ads smoking a cigarette almost — let me see that exhibit over there, that exhibit. Throw that over here one time.

You see these people in the ads. You see them smoking and it's kind of elegant. They kind of smoke, and it looks kind of cool.

When he smoked, did he smoke like that? Or did he smoke like these people that you see outside of the building where they are trying to quick, get as much as they can?

A. He was smoking like, you know, until his jaws sink in and hold it in for as long as he possibly could and then blow out.

[Tr. 79] Q. Did he take his time when he would sit out there or stand out there in the rain and just kind of take his time and smoke that cigarette and have a good time with it? Or did he smoke and get it done as quickly as he could?

A. He would smoke it like — he would just — sometimes he would take his time. Sometimes he would smoke it hurriedly because he smoked so hard that the cigarette would burn fast.

So he would smoke it hurriedly because if he is smoking real hard, it would burn fast. If it's not, well, he would sit

out there and sometimes he would smoke two or three and that's when he is taking his time because they don't burn — takes more time to burn.

Q. Now, when he would smoke a cigarette, did he smoke it where he would like smoke a cigarette and a couple hours later you would see him smoke another one?

A. No, not that long. He would smoke a cigarette and like chain smoke. He would smoke a cigarette, put it out, light up another one.

Q. Did he ever in your presence, to you or to the kids, talk about what the cigarette companies said about how dangerous cigarette [Tr. 80] smoking was?

A. Yeah. I would talk to him about it. The kids, they probably did, but it didn't happen around me as much. Sometimes, Jess, my second oldest son, he lived with us for about six years. About two years before Jesse died, he moved out again.

So he would talk to him about it. He even bought patches for him. He would leave — find magazines, get magazines, leave out the articles and tell his dad to read them. But I don't think his dad ever read them because the book would still be there and always as if it never had been moved. So — but he did that a lot.

Q. Would Jesse Williams Sr. ever came back with anything that believed about how dangerous the cigarettes were?

A. Jesse would try to bring something back. If he did bring something back, it would be something that is showing that cigarettes is not as dangerous.

Q. And I think I may asked have asked you this before, but I can't remember right now. Did he ever talk about other things causing cancer [Tr. 81] besides cigarettes?

A. Yeah.

Q. Tell the jury what he said about that.

A. When we were talking about the cigarettes causing cancer and that they are — it's addictive or that it is going to cause cancer, that's what we were talking about, he goes, "Well, everything is causing cancer. If you listen to the Government, everything you eat, drink, or whatever is causing cancer."

Q. Now, you said that he got to the point where he was coughing up a whole of phlegm —

A. Yeah.

Q. — or stuff?

A. Yes.

Q. When was it that that became a productive cough?

A. Yeah, it began after he started seeing Dr. Kern. It first began, not too bad by '91, because that's when I first got him to get Dr. Kern as a primary doctor.

And then he still did it, but it wasn't quite so bad. And he wouldn't go to him no more.

* * *

[Tr. 85] Williams about what that meant to him? I don't mean having cancer, but that it was caused by cigarettes.

A. Just that, you know, that he should have stopped smoking, and now he's got cancer. That's basically what I said to him.

Q. And what did he say back to you?

A. He was like angry. And he goes, like, "Yeah, well, those darn cigarette people finally did it. They were lying all the time."

Q. Did he indicate whether or not he had believed the things that they said about cigarettes and health; in other words, what the tobacco company had said?

A. No, not at that time, he didn't repeat about what they had said. But he said he was deceived by them. That's what he said, something to that measure. It was that, you know, they had — he was like blind or something. I don't know how he said it. I can't remember the exact words that he said, but it was like he had been portrayed.

Q. Did he talk to you about quitting smoking once he had the diagnosis?

[Tr. 86] A. He couldn't.

Q. Did he try?

A. No, he didn't try.

Q. Did the doctor tell you whether this was a disease that Jesse Williams was going to recover from when he had the cancer diagnosis?

A. No, they told him right away. First, when Dr. Segal told him that he had cancer, he explained to us that he might live only six months, if he didn't have treatments.

So then he made — he made an appointment with Dr. Turner, and we went to him. And he explained that if he did have the treatments, chemo treatments and radiation, that he might be able to live two years. But that's the extent of his life that he might have after he had those treatments.

Q. Did the doctors tell him that he could have surgery and that they could cut a tumor out and make it so that he didn't have any cancer?

A. No, that's what they told us. That he could not have — because we asked — we had a whole slew of questions to ask them. And that was one of the questions. And they said

no, they couldn't operate because the cancer was too close to his heart to cut — to take it out.

* * *

[Tr. 101] didn't use the word, but I jotted down "stubborn," that I may not be the right word. You said that when Jesse made up his mind, that's the way it was, for him anyway?

A. Yes.

Q. So he himself was a strong man, an independent thinker?

A. Yes.

Q. A guy who made up his own mind about what was right or wrong or what was good or bad for him?

A. Yeah.

Q. Did you talk to your children, you and your husband, as they were going up, about the importance of trying your best to lead a healthy lifestyle?

A. Yes, we did.

Q. And, of course, you taught them not to drink excessively and to eat good foods and do what was right to grow up strong?

A. Right.

[Tr. 102] Q. And that included — you told us a little story about Calvin and the broomstick. You and your husband worked on teaching your children not to smoke cigarettes?

A. Right.

Q. And I think you indicated that your husband told them that it was a bad habit smoking cigarettes, and that it was bad for their health?

A. No, I didn't say that. But he did tell them it was a bad habit.

Q. Okay. When Mr. Williams was in Japan for a while, before he went to the Korean conflict, when he came back, he taught himself a little Japanese, right?

A. Yeah, he speaks some Japanese when he came back.

Q. And he liked to speak Japanese with Joanne?

A. With the kids, right.

Q. In the conflict in Korea, as I recall, you indicated that he was a truck driver, isn't that right, for the artillery group there?

A. Yeah.

Q. And he wasn't actually in combat, but he was pretty close to it?

A. Yeah, he was very close.

Q. You talked quite a bit about your husband here today.

I wanted to ask you a couple of other

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[Tr. 121] Q. You didn't?

A. Not at — not at that time, not so much.

Q. Did you show Mr. Williams the warnings on the cigarette packs? Did you point them out to him?

A. No, I've never pointed them out to him.

Q. You never did that?

A. No.

Q. I ask if you recall this questions and this answer, Mrs. Williams?

MR. DUMAS: Page 7 — line 12, Counsel.

"Q. You testified earlier that there were times that you would call your husband's cigarettes cancer sticks. when did you do that?

"Answer: Oh, there would be times, like he would be smoking, like you asked me previously, about did we see the signs on the cigarettes, the warning signs on the smoking tobacco. I would show those to him and tease him and say, like, quote, 'That's okay. You go on and keep on smoking that cancer cigarette.'

"And then he would go, 'Okay, yeah, you know, the tobacco companies, don't even say they're cancer sticks, so I can smoke them.'

"And I said, 'Read the slogan on there

* * *

[Tr. 126] didn't he?

A. Yes.

Q. He also liked to watch TV?

A. Yes.

Q. And that would includes the evening news?

A. Yes.

Q. And he was the kind of man who liked to listen to — what do you call that — talk radio in the car?

A. Yes.

Q. Where they talk about current events?

A. I don't know. He had on a station where they would just be talking on the radio. I didn't pay much attention to it.

Q. Okay. I understand that he also read Consumer Reports magazine; is that right?

A. Yeah, he had read it some.

Q. Do you recall when the kids were growing up they would come home from school after they had been taught things in school about smoking and health, and they would — they'd come home, and they would ask Mr. Williams to quit smoking?

A. No, I don't remember that.

Q. They never did that?

A. I don't remember them doing it. [Tr. 127]

Q. Again, I am going to refer you to the interview that you had with Dr. Resnick with Mr. Tauman present.

MR. DUMAS: Page 7, Counsel.

BY MR. DUMAS

Q. "Question: Did the kids ask him to stop"

"Answer: No, he just stopped.

"Question: Did the kids ask him to stop smoking?

"Answer: Oh, yes, they did.

"Question: I know in school kind of early on, they did a lot of education about smoking. I don't know about when you were in school, but a lot of times kids came home to tell their moms and dads they'd want them to stop.

Did you recall your daughter being present there and answering, saying, quote, "We did that all the time. Please stop smoking. It was killing him and it was so stinky and it bothered mom and was making her sick, and, you know, stop."

A. I don't remember that.

Q. You don't? Okay.

MR. THOMAS: I am going to object to

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[Vol. 13-B] [Testimony of Gerald Segal (Mar. 10, 1999)]

* * *

[Tr. 20] Q. What did you find about that?

A. That the patient had smoked two packs of cigarettes per day for the past 45 years, for the 45 years before the visit.

Q. Okay. Just while we're on that subject of his smoking habit, project forward over the next basically five months and a day that he lived. Do you know whether Jesse Williams ever was able to quit smoking?

A. I don't believe that he was able to quit.

Q. Turning to another issue, did you make an observation or a record of a history of weight loss?

A. Yes, I did.

Q. What did you understand to be the case about weight loss?

A. He stated that he had lost approximately 27 pounds in weight over the preceding six months.

Q. Is weight loss in this context a significant clinical sign of the cancer?

A. Yes, it is.

Q. Do you have — would you characterize weight loss in the context of what was the first sign or symptom of this cancer? I guess I'm asking you to look through the retrospective

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[Tr. 83] Q. And when Dr. Turner reports that he took multiple biopsies — is that what his report says?

A. I would need to look at it, but usually they do take multiple biopsies.

Q. I'll read from Page 482 of Exhibit 164. "Following inspection of the airways, multiple biopsies were obtained and submitted for histology." Histology means the biopsy is sent to a pathologist to look at it under a microscope?

A. Yes, that's correct.

Q. As you understand what is done in a bronchoscopy procedure and what Dr. Turner did here, is there any question in your mind that Dr. Turner visualized the tumor and took pieces of it with an instrument?

A. No question.

Q. Do you have any reason to be concerned in this case about a possible misdiagnosis because he didn't have tissue from the right place?

A. No.

Q. Did Jesse Williams ever have signs or symptoms of cancer in any other part of his body besides his lungs?

A. No.

Q. Now, there was some discussion about

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[Vol. 14-B] [Oral Argument — Defendant's Motion for a Directed Verdict (Mar. 11, 1999)]

* * *

[Tr. 102] on this issue was fairly well set up. This issue was addressed on summary judgment. We said from the outset, of course, we cannot point to an individual misrepresentation, a specific time in October in 1968, when somebody from the Tobacco Institute went on the television and said "X" and Jesse Williams remembered that one statement, et cetera. That would be absurd; we would never claim it.

This is about as far from a standard fraud case as you can possibly imagine. Defendant's contention amounts to the assertion that if you repeat something often enough and if the strategy is long term and complex and successful enough, then the plaintiff is out of luck, he has got no cause of action.

Because there were so many misrepresentations, so many attempts to create false impressions, that plaintiff cannot now point to one, or his widow cannot now point to one. Obviously, we're not relying on an individual misrepresentation. We think that issue was decided on summary judgment before trial.

In any event, what happened here is what the Florida Court called in the American Tobacco [Tr. 103] case, "A fraud on the American public." There are very specific false statements. The statement in the Frank Statement, "We accept the public health as a basic responsibility paramount to every other consideration in our business."

That was a false statement of their turn of mind, what they intended, what they were trying to do. If you believe the evidence that the plaintiff put on as to why CTR was set up, to create an impression that they were looking for answers, to create, in their own words, the Tobacco Institute's own words, as false controversy, the idea that there was a controversy here without actually denying the charge.

To do what vice-president George Weissman told CEO Cullman they should do right after the 1964 Surgeon General's Report, "We've got to come up with something to give them a crutch, to give smokers a self rationalization to keep them smoking."

This was a sophisticated combination of the addictive properties of nicotine and to offer rationalizations to the addict, so the

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[Tr. 109] So I will say, Mr. Randles, to say there is no evidence in the record on what Mr. Williams relied, I think I have to take issue with that, because there is evidence that Mrs. Williams said he felt betrayed and felt deceived and that he had told her on occasions that — to the effect that he was relying on the tobacco company, because they wouldn't be marketing an unsafe product.

There is some evidence about what his mental state was relative to representations generally. There is also evidence that Philip Morris was a member of the various incarnations of the public relations entities, and to that extent, CTR or TI or TIRC made statements that can be attributed to Philip Morris.

So the fact that there isn't a particular misrepresentation directly associated with Philip Morris, I don't think that is necessarily fatal, but the rule, rather than of the theory, is, I think as both sides recognize, something new.

We haven't seen this particular approach to a fraud claim in Oregon law. And it's a tough one. What has happened elsewhere in

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[Vol. 15-A] [Testimony of Glenn May (Mar. 12, 1999)]

* * *

[Tr. 68] residents of Oregon about the health risks of smoking?

A. I have.

Q. And again, we'll break it down by time period, but in general, what is your opinion?

A. Well, my opinion is that knowledge about the dangers, the hazards of cigarette smoking were so routinely discussed, so ingrained, so much reinforced by every form of human communication that the common knowledge of Oregonians was that cigarette smoking was dangerous, indeed so dangerous it could kill you.

And along the same lines, that the common knowledge of Oregonians, for the same reasons, was that tobacco was addictive.

Q. And Professor May, briefly — and the jury's heard some of this before, so if we could just cover it very briefly —

A. Sure.

Q. — I'd like for you to tell them about how tobacco and cigarettes came to be a part of American culture, and if we could, could we start with Columbus?

A. Uh-huh, sure. Well, okay. Columbus.

Europeans first came into contact with tobacco — it's a New World crop — as a result of Columbus's explorations. The first reference we have in European literature to tobacco actually comes from

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[Tr. 97] of smoking?

A. I did.

Q. And you already listed the types of magazines you reviewed.

A. Yes.

Q. There are one or two I'd like to talk about just briefly with the jury.

You mentioned you noted Reader's Digest. Now, is there anything unique about Reader's Digest in the universe of magazines, if you will?

A. Well, it's one of the most popular, indeed, for much of the century, of the most popular magazines. It also, by the way, didn't accept advertising till 1955. But one other thing that I should mention, at least in passing, is it's one of these magazines which, I don't know, we might say has a pass on-readership.

I don't know that your experience was, but because I'm somewhat older, I'm sure, than everyone here, but, you know, in waiting rooms, doctor's waiting rooms, anybody's waiting room, you find copies of Reader's Digest, you'd read it. You'd find it on coffee tables and so on, and so the point is that more than one person who's a subscriber, typically, will read Reader's Digest."

That was my experience. I used to go to my [Tr. 98] aunt's house on weekends and pick up Reader's Digest.

Q. Professor May, did Reader's Digest at any point in time ever accept tobacco advertising.

A. No, no.

Q. Did Reader's Digest have any viewpoint on tobacco?

A. Oh, yes. Really started in 1924, with an article by Irving Fisher, Professor from Yale University in economics, and a major figure in the anti-smoking movement, they were more or less conducting a crusade against smoking, driving

home the point that it was dangerous, that it could kill you, that it was addictive. And in some — there are more than a hundred fifty such articles up to 1987.

Q. Did you bring a few just representative samples for the jury?

A. Yes.

Q. Now, the articles we're about to show from Reader's Digest again, is this — does this represent the universe of articles in Reader's Digest about smoking, or is this a sample?

A. No, this is just a sample.

Here's one — there are a good number of the states from the '30s, I believe, there are a good number of articles from this, "So You're Going To Stop Smoking," [Tr. 99] by people who are ex-smokers trying to tell them, give them hints, help in trying to get off the habit, also conveying the message that it's addictive, and always along the way saying how harmful it is to you. That's why they want to get off it.

MR.RANDLES: And, Your Honor, if I could just note for the jury — I won't do this with each of these, but most of these articles that will be shown are defense exhibits, and the jury will be provided with them.

THE COURT: Okay.

THE WITNESS: Okay.

Q. (BY MR. RANDLES) Is this another example?

A. Yes, another of that same type, "Are You Man or a Smoke Stack," by an ex smoker.

Q. Did Reader's Digest also cover reports about the research concerning smoking?

A. Oh, yes, extensively. In fact, and they commissioned their own reports. Mostly Reader's Digest reprinted things

from other magazines, but they did commission — and this is on the smoking issue — in particular studies by, I think, people to deal with the smoking issue.

Q. Is this an example, Professor, this December, 1952 article, "Cancer By The Carton"?

A. This is actually a reprint from another [Tr. 100] publication. It's a very famous article, apparently had quite a substantial impact, "Cancer By The Carton" by Raynor. It only actually is two pages long. Maybe that's part of the reason it had such an impact.

And, by the way, there's evidence in The Oregonian that they were out of advertisements — I didn't realize this, but I learned it from my research, The Oregonian would every once in a while advertise — or the Reader's Digest would advertise in The Oregonian, telling you there would be an upcoming article, and what it would be about, and more often than not it would be about smoking.

Q. Briefly, before we get off of this article, would it be fair to characterize this as a very famous article?

A. I think so.

Q. Why is that?

A. Well, for one, it came at a time when there were increasing numbers of scientific studies that were pointing out that much of what people had in their heads already from common knowledge was indeed true, scientifically true, or suggesting that it was scientifically true.

Lots of studies were coming out in this period, and this helped to popularize — remember, you're talking about a magazine that has a circulation in the U.S. in [Tr. 101] the range of 10 million ballpark, 10 million in that time period — with a pass on readership considerable — how much it would be one doesn't know for sure. I've heard the figure 10 readers for every one copy, that sounds a bit high to me, but it

was, trust me, in all these waiting rooms. So this had a huge, huge impact.

Q. Just briefly, do we have some other examples of continued reporting on this subject over time by Reader's Digest?

A. Oh, yes, we do. "Can the Poisons of Cigarettes be Avoided?" This was one questioning to what extent it may be possible to using filters to lessen your chances of getting killed in effect.

Q. Is the date on that 1953, Professor?

A. Yes.

Q. Is this example from 1962, the same type of article?

A. Well, it is. It's about — actually, it's British research. In some ways the British were slightly ahead of the U.S. in making a governmental determination about the link between lung cancer and smoking, at least officially. And this is reporting actually a decision by the British government in '62 to come down against cigarettes, and officially making the link between lung cancer and cigarettes.

[Tr. 102] Q. Did this type of coverage continue into the 1970s?

A. Oh, yes, and beyond, up to the present.

Q. Is this an example from 1976?

A. Yes, "Beware That Cigarette Cough." And we all know what that's like. I mean, I grew up in a household with a three-pack-a-day smoker. Anyhow, so you know what that's like early in the mornings. Pretty horrifying.

Q. And an example, from 19 — is this an example from 1989?

A. That's right. And the title says it all, "Scared Smokeless." Again, it's an effort to help readers get off the habit.

Q. You mentioned Stars & Stripes earlier.

A. Yes.

Q. Is that a newspaper given to people in the service?

A. That's right, by people in the service.

Q. Did you review Stars & Stripes and find some articles regarding the reporting on health risks during the period of time Mr. Williams was in the service?

A. Right. And again, let me just point out Mr. Williams was in the service from '48, I think, to '52, '52 or '53, but I think '52, thereabouts.

Q. Without particularly going into the text of the articles, let's just talk about whether there was a general [Tr. 103] coverage of the matter. Is this a 1948 article?

A. Yes, that's right.

Q. What's the headline?

A. "Cigarettes Said Disease Cause."

Q. Is this a similar example in 1952?

A. That's correct.

Q. And what's this headline say there?

A. "Cancer Symptoms Found in Smoking Tests, Society Told."

Q. And is this another example from 1952?

A. Uh-huh. "Smoking Ups Lung Cancer, Study Shows," supporting the scientific tests that I was mentioning, scientific studies.

Q. Now, Professor, I want to move us forward in time a little bit, and we've talked about the pre 1950.

Now, I want to sort of bracket a period of time from 1950 to 1964.

A. Uh-huh.

Q. Picking 1964, because of the Surgeon General's report, did coverage of this issue, other than things we've already shown, continue during that time period?

A. Oh, yes.

Q. Was — and again, just briefly — were the links in the studies and the discussions about smoking covered on the television news?

[Tr. 104] A. They were.

Q. Was it a frequent subject on the television news?

A. Oh, reasonably frequent. There's certainly — and they were of course famous studies. I think people in journalism school are well aware of the work of Edward R.Murrow, one that was most famous. That's a two-part series going into the conflict about the lung cancer and cigarette risk.

Q. Now, briefly you mentioned earlier, briefly, educational films. This was a period of time in which they continued to put out those sorts of films?

A. Well, they really escalated in this period. Films had been used in schools, and I found many, in fact, from the 50s, because it was in the 50s when you first start seeing these films in any number.

Q. Was there a famous film during that time period called, "One in 20,000"?

A. That's right, there was. I think it was produced by the American Temperance Society.

Q. Was that shown in schools all over the country?

A. Yes. And actually there's evidence in some of my exhibits. I don't know if I brought it as an exhibit, but it was shown throughout Oregon.

Q. Can we talk — you mentioned Time Magazine earlier.

[Tr. 105] A. Yes.

Q. Did Time Magazine cover these issues during this time period?

A. Oh, extensively.

Q. Is there any evidence in this case as to whether Mr. Williams was a reader of Time Magazine?

A. That's right. Depositions indicated he read Time Magazine, Reader's Digest, and Life — yeah, Life Magazine, Oregonian, Skanner.

Q. Is this an example from 1952 of coverage in Time Magazine?

A. Yeah, "How to Stop Smoking," again conveying the point that it's a tough habit to break.

Q. Is this another example from 1952?

A. Uh-huh.

Q. Could you read the caption at the top, Professor, which I don't think the jury can see.

A. "Smoking and Cancer."

Q. Did that become a semi-regular feature in Time, the "Smoking and Cancer" headline?

A. That's right. It was either "Smoking and Cancer," sometimes it would be, "Smoking and Cancer Continued." That's how often it was, in fact, covered in Time Magazine.

Q. I think we may have an example of that, if I'm [Tr. 106] successful in calling it up.

Is that an example of the "Smoking and Cancer Continued"?

A. Yeah. There we go, "Smoking and Cancer Continued."

If I could, jut for a second, just — the historian in me has to interrupt the professor. This pictures, by the way, three major figures — actually, two major figures, and one other I could identify, in the scientific investigations concerning the link between smoking and illness and death.

This E. Kiler Hammond, he was really chief statistician for the American Cancer Society, the major player in the studies in the 1950s, particularly '54.

The first announcement that drew major attention to the statistical link — the scary statistical link between smoking and lung cancer was by E. Kiler Hammond.

That's Daniel Horne, who worked on the project with him — and I think we may have a quotation from him later — another respected scientist, and that's Charles Cameron, who is an executive in the American Cancer Society.

And this is a study about — an article, rather, about the research that they're revealing to the [Tr. 107] public about the scary link.

Q. And did that coverage in Time Magazine continue?

A. It did.

Q. And is this an example from 1956?

A. It is, yeah. It was pretty relentless, "Smoking and Cancer." Oh, yes, this is — is it '57? I can't see — it's a little bit blurry, I think.

Q. Would it be correct this is a Time Magazine from June 17th, 1957?

A. Yes, that's right. Remember, I talked about this American Cancer Society study, and this was really the final report. American Cancer Society did a study of 188,000 people, and trying to determine what was the risk they had, if

they were smoking, of contracting lung cancer, but also they studied heart disease, and as well mortality — and these are the tables that talk about — scary.

These suggest that if you smoke, chances were you lived something like eight years less than anybody else. So that's Time Magazine.

Q. And is this another example from 1959 of their coverage?

A. Right. Yes, that's right. "Smoking and Cancer Continued." You know, let me point out just as an aside, Time Magazine took cigarette advertising, and yet [Tr. 108] they're reporting this. In any event, that's just an aside.

Q. Is this another example from '59 from that same series, "Smoking and Cancer"?

A. "Smoking and Cancer Continued." I guess you're getting the point.

Q. To change subjects to another magazine that you referred to earlier, did Life Magazine cover smoking and health issues?

A. Oh, my, of course it's the same publishing house, it's Henry Luce, and they certainly did.

Here's a Life Magazine, December, '53. That's the year the famous mouse painting study was done. I don't know if you have seen any of those.

Q. I'm sorry. I didn't mean to talk over you, Professor.

Is this the article inside that same magazine?

A. That's right. You have the mad scientist over here. In any event, this, in order to get extracts from cigarettes, they would — they had to invent these cigarette-smoking machines which would get tar, in effect, and then they painted them on the backs of mice.

I'm glad you can't see it too close because it's pretty grisly — and as it happened, in these experiments, these tests, the principal player was Ernest [Tr. 109] Winder. They were able to produce, in the laboratory, cancer in these mice. And that was seen as an important breakthrough, because remember, scientific standards of proof are higher than most of ours.

So it was deemed to be very, very important to produce in the laboratory a cancer, and this was seen as a major breakthrough, and it caused a great furor when they did this study.

Q. Did the coverage in Life continue? Is this an example from 1952?

A. That's right. Somewhat humorous, but, again, it's not a humorous subject by any means. "How Do I Swear Off Smoking?" And here you have the coffin nail, showing you what the consequences are if you don't stop smoking, but then these people are going through all sorts of horrible contortions, you know, in order to get off this awful habit, so cutting off their arm, and hanging themselves, and so forth.

Q. Professor May, there's been some suggestion in this case that because cigarette companies were big advertisers in certain magazines, that that somehow depressed or interfered with coverage of smoking risks in the popular press. Do you agree with that?

A. Oh, no, not at all.

Q. What is your basis for disagreeing with that

* * *

[Tr. 115] A. That's correct.

Q. Have you seen any evidence in your research that Mr. Williams talked to his own children about the risks of smoking?

A. Oh, yes, I have.

Q. What evidence have you seen to that effect?

A. Well, I've seen it in depositions. I've seen, what, 15, 16, or so depositions which talk about it, and indicate he gave fairly strong signals to his children that smoking was bad for them.

There is — I'm not sure if I brought this as an exhibit or not — of a board, but there's a reference to his Mr. Williams chasing after — I believe it was Calvin Williams with a broom, and so, I mean, I think the message was quite clear.

Q. Professor, were there polls over time, public opinion polls, that talked about the risks of smoking and what the public perceived?

A. Yes, there were.

Q. Is this an example of the famous one from 1954?

A. Well, yeah. It's a pie chart reporting results, it's a June, '54 Gallup poll reporting 89.9 percent of the people sampled, 1400 and change, 1400 plus people were asked in that particular Gallup study, and and 89.9 percent of them had heard or read that smoking [Tr. 116] causes lung cancer.

Q. Now, Professor May, there's been some discussion of polls, and some criticism of polls in this case.

A. Uh-huh.

Q. I just want to be clear, are you basing your opinion in this case largely upon polling?

A. Oh, no, no, no. I have, I would say, sort of a healthy skepticism about polls. I'm not often sure what they mean. And you know, this is one of so much stuff that I've been looking at over time, so I can't exclude from my research polling data.

What's interesting about the polling data is that it does confirm what I've been telling you, that people were getting the inputs, they had heard or read that smoking caused lung cancer. It didn't mean everybody at this point was convinced — scientists weren't convinced.

This was 1954, and there was a debate, a real debate in the scientific community about the lung cancer/smoking connection, but the numbers do go up steadily, as one would expect, as more scientific evidence comes out, as scientists come to some stronger conclusions.

MR. RANDLES: Thank you, Professor.

Your Honor, may counsel and I approach for a

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[Vol. 15-B] [Testimony of Glenn May (Mar. 12, 1999)]

* * *

[Tr. 4] compared to what one might see today?

A. Oh, yes. Yes. Quite considerable difference, in that nowadays I think all of us are absolutely convinced that by the scientific evidence. Scientists, in my view, appear to agree that cigarette smoking causes lung cancer, so it is not any big news.

There are further studies. There are further studies that add some details to this picture that come out. They come up in the press. But it is not the big furor that it was in the '50s and '60s. The amount of coverage was pretty overwhelming on those particular issues having to do, above all, with cancer, heart disease, mortality. That's sort of news.

Q. Professor May, regarding the 1964 Surgeon General's Report, these jurors have heard a lot about it, so I don't think we need to get into the exact circumstances surrounding it.

But when the Surgeon General's Report came out in 1964 with its findings that cigarettes were causally linked to lung cancer in men, was it big news?

A. Oh, it was a big story, covered nationally, and it was a front page story. [Tr. 5] In the Oregonian, it was a first-page story. Around the world, really even beyond the U.S — the U.S. was a major player of all that, of the first-page story. Once more, throughout the month of January, it was covered again and again.

When one finds — I think — I found 30-plus stories in the month of January '64 having to do with the health risks of smoking. And in some years you might not have that many, as many as that, as 30-something-odd stories.

Q. Did you bring some examples for us of some of the coverage?

A. I did.

Q. With the Court's permission, would you step around by that screen?

THE COURT: Go ahead.

BY MR. RANDLES:

Q. I want to ask you if a couple of these are a couple of examples of the coverage?

A. That's definitely not the coverage.

Q. Perhaps not.

MR. RANDLES: With the Court's permission, I will let my more technological competent colleague look at the computer while I proceed. And we may come back to it.

[Tr. 6] Were there a number of stories in the popular press about the Surgeon General's Report throughout 1964?

A. Oh, yes, there were.

I can do this to music as well, apparently.

Q. There was some testimony in this case that it was maybe a big story for maybe a couple of days and then faded away. Would you agree with that assessment?

A. Oh, no, no. It was a huge story. I can't remember, I saw something recently, I don't know if it was in some magazine — People Magazine, or whatever — they were looking at the biggest stories of the past 50 years or so. This is one of the top 100. So it was big news. There was so many smokers. More than half adult Americans smoked. That's why it is big news.

Q. Let me offer you some examples. Can you tell me — here is one.

Is this a story in Time Magazine at the time discussing the Surgeon General's Report?

A. Yes, it is. I wish I could read the day. But Time went to bed — is that what they talk about in the news people? It goes to the — the [Tr. 7] press at a certain point, and as it went to the press, the story was just breaking. So it was about a week before Time covered it. It didn't mean that Time didn't think it was important. It had already gone to bed, gone to press.

In any event, it was a big story in Time Magazine. There was Surgeon General Luther Terry with a copy of the report — actually, you saw a copy of it before with the Counterblaste, and pictures like this appeared around the U.S. and around the world.

Q. Perhaps if you could just show a couple of examples from The Oregonian.

A. Yes. First page, "Report links cigarette use with cancer."

Q. Is this another example?

A. Yes. "It's official now: Cigarettes can kill you." That's later in the month, too. It is the 28th of January. So — and the message being sent was, "Now your government is telling you that it can kill you."

Q. In response to the Surgeon General's Report, was there an increase in anti-smoking organizations' activity levels in the state of Oregon?

[Tr. 8] A. Oh, yes, absolutely. There was just a mammoth amount of activity, as you might imagine. For example, school superintendents were telling teachers that they needed to get on the case right away. There were television shows about it, public television, but also regular television. Lots of organizations were popping up, anti-smoking clinics all over the place with lots of people streaming into them after seeing it being covered in the press.

Q. Have you seen any evidence that Mr. Williams was aware of the Surgeon General's Report in 1964?

A. Well, as I recall, in the deposition of Mrs. Williams, there is a reference to their discussing the Surgeon General's Report. I can't remember the exact wording.

Q. Did there come a time in 1966 when the law required warnings to be placed on packages of cigarettes?

A. That's correct, 1st of January, 1966.

Q. Do you have some examples of the warnings with you?

A. Yes, yes, I do.

Q. Was this the first warning that was put

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[Tr. 12] A. Yes. Actually, this comes from an article, Journal of the American Medical Association. But I think it is indicative of the extent to which people were aware of the danger. This is an AMA statement to the effect that "labeling of cigarettes will not alert even the young cigarette smoker to any risks of which he is not already aware."

Q. Was the date of that April 6, 1964?

A. That's right, yeah.

Q. Were there similar statements by authorities in the field during that time period?

A. Yes, absolutely. This is Daniel Horn. Remember his picture before, smoking a pipe along with E. Tyler Hammond. He was one of the major players in the research. He said in 1968, "You can stand on a rooftop and shout smoking is dangerous at the top of your lungs and you would not be telling anyone anything they didn't already know."

So the state of knowledge was considerable.

Q. Now, Professor May, we have shown the jurors a lot of newspaper headlines, and we won't belabor the point.

* * *

[Tr. 38] THE WITNESS: Thank you, Your Honor.

Well, with that proviso, I'm not a scientist, yes, I believe that smoking causes lung cancer.

BY MR. GAYLORD:

Q. And you came to that opinion by reviewing the material that you have reviewed?

A. No. I came to that opinion by living with an addicted smoker who died of smoking-related illness. My dad. And when you live in a family with an invalid, you — it has an impact on you.

Q. I'm sorry, but did you draw your own conclusions from that experience that that changed you personally in your view of your relationship between smoking and lung cancer?

A. I was a little child when my dad first had heart attacks, was told to get off smoking, the smoking, the coughs in the mornings. I woke up in the morning to my dad's smoking cough. It wasn't much of a — it wasn't very difficult for medical science reports to be convincing to me. I knew smoking was bad.

Q. And you may have already answered this within your other opinion, but do you believe that [Tr. 39] smoking cigarettes is addictive?

A. I do. My dad, in my view, was addicted.

Q. Do you find it a little ironic that Philip Morris, whose lawyers hired you to come here and express your opinions about common knowledge, denies to this day that cigarette smoking causes lung cancer or addiction?

A. Ironic? Well — I guess I don't. The answer to that, I'm not a big boy, and I do make a distinction between common knowledge and scientific knowledge. I'm not going to be — I don't view myself as a defender of Philip Morris. I am someone who tells you about the history.

In terms of the scientific side of things, I think it could be that what Philip Morris is denying, that in their view it is scientifically proven, that's — that's my reading of the situation. So I don't see great ironies, but others might.

Q. You don't think there is any inconsistency in Philip Morris' position between claiming that common knowledge knows these facts, while their position publicly is that they are not proven?

A. I don't. I don't. I do see a difference

* * *

[Tr. 46] or as well."

A. Uh-huh.

Q. And, as you pointed out earlier, if you were to ask your doctor or almost any older person about using tobacco, he would advise you to leave it alone.

A. Yes.

Q. Do you have any information about whether Jesse Williams and his family had a personal physician in the '40s in Crockett, Texas?

A. I don't, sir.

Q. The other textbook from that time period, Defendant's Exhibit 745, Health and Human Welfare. This is the one that I think you indicated was high school or junior high?

A. If I could see the title, I could tell you.

It is high school. It is "HS."

Q. And it was full of good information about tobacco products, including nicotine, "The alkaloid of tobacco considered a violent poison does not appear in tobacco smoke"?

A. Uh-huh.

Q. And this is real hard to read. "Observations by some of the world's best [Tr. 47] authorities." I don't think it can be focused any better. It is the way the original is.

"By some of the world's best authorities seem to indicate that a man may bring on one or the following disturbances to his body by heavy smoking: High blood pressure, rapid heart action, shortness of breath, palpitation of the heart, and pain in the region of the heart."

A. Uh-huh.

Q. And, like the other one, "Tobacco is injurious to the development of a boy, and therefore, does him permanent physical harm."

Then it goes on to say, "Smoking, even in moderation, is a handicap in athletics. Nonsmoking athletes show more consistent improvements than athletes who smoke and nonsmoking athletes are better disciplined and in other ways more helpful to a team than smokers."

A. Yeah. Right.

Q. So you are not suggesting that in the '40s anything came into the common knowledge that should have told any smoker or prospective smoker that they could get lung cancer from smoking cigarettes?

A. I would say that's a fair

* * *

[Tr. 67] has been impossible to establish that the feelings persons have upon giving up smoking are anything but that which would be expected when one is frustrated by giving up any desired habit."

A. Uh-huh.

Q. You consider that, again, to be a statement contrary to common knowledge in 1988?

A. I do. I also don't — I'm not aware that it got to Oregon. I didn't see it.

Q. Okay. Well, let's see if we can find an example similar that we know got to Oregon.

Are you familiar at all with a document that — I will show one of the many versions of it available called "Facts you should know." This one happens to be enlarged from the New York Times, April 15, 1994.

A. Yeah.

Q. I will represent to you that the same document and the same words appeared in The Oregonian on the same date, all right?

A. Yes. It did appear in The Oregonian. I remember pulling it and putting it in a folder.

Q. You are familiar with the contents of this document?

A. Yeah.

[Tr. 68] Q. This document, as you know, says —

A. But actually I'm saying yes, but I don't know in detail. I know in general.

Q. All right. Well, if this document — I will just find some parts of it to read here.

"Philip Morris does not believe cigarette smoking is addictive." Are you familiar with that statement by Philip Morris in April of 1994?

A. Yes. That part of it, I recall.

Q. All right. And you recall that statement is directly contrary to what you have told this jury was common knowledge for years by that time?

A. Right. I guess back to my chart here, too. It is the one you are pointing me to. The distinction I have made from time to time is between — I will do the butcher block again, if you will. Common knowledge —

MR. GAYLORD: Could I have the question read back, please?

(The court reporter read as follows:)

"All right. And you recall that statement is directly contrary to what you have told this jury was common knowledge for years by that time?"

* * *

[Vol. 15-B] [Testimony of Henry Williams (Mar. 12, 1999)]

* * *

[Tr. 115] Portland, Oregon in 1961, lived there until 1980.

Q. Okay. What was the cause of death of your mother?

A. My mother — I think she died of cancer.

Q. Was she a smoker?

A. No. She died of — it is a combination of cancer and pneumonia.

Q. What was the cause of death of your brother Freddy?

A. Cancer.

Q. Was Freddy a smoker?

A. Yes.

Q. Do you recall what type of cancer he died of?

A. I don't know the specific kind.

Q. You moved from Crockett in 1955 when you joined the military, right?

A. Yes.

Q. Did your mother discuss smoking with you prior to you joining the military?

A. Yes.

Q. Do you recall how much before?

A. Well, from childhood my mother — smoking was forbidden for any of the kids in our family.

Q. How did they tell you that smoking was [Tr. 116]forbidden, how did you know that?

A. "Don't smoke," that simple.

Q. Was it your mother or your father who would tell you?

A. My mother.

Q. Did she tell all the kids?

A. Yes.

Q. Did you hear her tell all the kids?

A. Yes.

Q. You heard her tell Jesse?

A. Yes.

Q. Do you recall when she told Jesse?

A. No, I don't recall when. It was an every-so-often thing, it was just —

Q. Was it while you were still living at home in Crockett?

A. Yes.

Q. Did she tell you why they were forbidden?

A. Yes. She said that they were harmful to you. She said that they would kill you.

Q. Did your father ever say anything to you about smoking?

A. No.

Q. Other than your mother telling you and hearing about the Surgeon General's Report, have

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[Vol. 18-B] [Testimony of Kenneth Ludmerer (Mar. 17, 1999)]

* * *

[Tr. 132] that were to be the case. You have got the world's scientific community going at this as one of the major scientific issues of the era. The United States, Britain, France, Germany, and other countries, teaching hospitals, Sloan—Kettering, National Institutes of Health. This is well-funded activity. The number of papers soars in the 1950s compared to the 1940s and 1930s by a multiple.

So the whole scientific community is going at this and coming up with results. And some results are positive, particularly the epidemiological studies. But the laboratory studies, as a generalization, tended to be negative.

Q. Let me ask you this: During this time period were there distinguished scientists outside the tobacco industry who did not believe that the statistical evidence had proven that cigarette smoking caused lung cancer in the 1950s and early 1960s?

A. What dates?

Q. From 1954 to 1964, were there distinguished scientists outside the tobacco industry that didn't believe that the statistics [Tr. 133] had proven smoking caused lung cancer?

A. There were distinguished scientists everywhere. This had very little to do with the tobacco industry. There were distinguished scientists who were willing to accept the epidemiological evidence, especially as the prospective studies began to be published. Then there were others who were equally respectable who were troubled by the negative biology, and this was a raging controversy in the late '50s and 1960s.

Q. Would you mind flipping the page and listing for the jury a few examples of some of the prominent scientists of

that time period who did not believe that statistics had proven that cigarette smoking caused lung cancer?

A. Who did not believe?

Q. Who did not accept the statistics as proof.

A. Which time period?

Q. 1954 to 1964.

A. Okay. Frank Horstall. Frank Horstall was the director of Memorial Sloan-Kettering Cancer Institute. Probably the most important private cancer institute in the United States. In [Tr. 134] 1962, Dr. Wynder has left Washington University, he is working at Sloan-Kettering. Dr. Horstall told Dr. Wynder —

MR. THOMAS: Objection, hearsay.

BY MR. HANDLES:

Q. Let's not go into the conversation.

A. He did not accept the tobacco hypothesis.

Q. What's another example of prominent scientists of the day?

A. Another would be Ronald Fisher.

Q. Who was Dr. Ronald Fisher?

A. Dr. Ronald Fisher was British and, in my view, he was by far the most distinguished scientist of all who was involved in the smoking health constituent.

Dr. Fisher was a great theoretical and statistical biologist. Earlier in his career, he had unified the discipline of genetics, the discipline of evolution, the so-called evolutionary synthesis, one of the great theoretical achievements of 20th century biology. He is a biologist like Einstein is to physics, a great theoretical master. And he was also a geneticist and he was very skeptical of the cigarette hypothesis.

[Tr. 135] Q. In the interest of time, let me ask you about one other name. Would you write Dr. Joseph Berkson up there and tell the jury who he was.

A. (Witness complies.) Joseph Berkson was at the Mayo Clinic. He was considered the dean of American biostatisticians. He, too, was troubled by the tobacco hypothesis. He did not feel that the statistical evidence warranted any conclusions about causality.

Q. Now, is this a list of all the scientists who did not believe the statistics had proven that cigarette smoking caused lung cancer during this period of time?

A. This is just a sampling.

Q. Were there many more?

A. Oh, there were lots.

Q. Let me ask you a question about 1957.

Was the question of whether smoking caused lung cancer resolved by 1957?

A. In the standards at the time?

Q. In the standards of 1957?

A. No, no. The prospective studies by 1957 had been published. And by 1957 you have some scientists who are much more concerned about cigarette smoking is the cause of lung cancer as

* * *

[Vol. 19-B] [Testimony of Carl Fuhrman (Mar. 18, 1999)]

* * *

[Tr. 21] Q. Doctor, I think this would be a good time to resume your seat.

A. Do you want to do the lungs?

Q. I'm sorry. How many do you want down?

JUROR SMITH: Before he resumes the seat, did he say where he first saw the 1991 part on the piece of lung thing?

THE COURT: Go ahead, Doctor.

JUROR SMITH: Can you show me on the exhibit?

THE WITNESS: She wants me to show where the tumor was on the original lateral projection in 1991. Is that correct?

If you remember, we said that the white line was obscured right above the origin of the right upper lobe bronchus. This is the right upper lobe bronchus. The tumor back then was right in this region, right over here.

JUROR SMITH: Okay. Thank you.

THE WITNESS: These are the same set of images displayed with lung windows. The lung windows allow us to look at the lung panoramically and allows us to look for pulmonary nodules, and there is no evidence of any pulmonary nodules in either the left or [Tr. 22] right lung.

I think you can really appreciate the narrowing of the right upper lobe bronchus here compared to the black branching structures which represent the left bronchi.

BY MR. SIRRIDGE:

Q. Just a couple of questions, here, Doctor.

Was Mr. Williams' tumor diagnosed in 1991?

A. No, it was not.

Q. Do you have an opinion as to why it may not have been diagnosed?

A. I think a finding on lateral projection is a subtle finding. I think most radiologists spend most of their time on the PA projection, and this finding was only apparent on the lateral projection as a subtle finding.

Q. And, Doctor, was Mr. Williams' cancer diagnosed in January or February of 1996?

A. No, it was not.

Q. Do you have an opinion as to why it may not have been diagnosed at this point?

A. It was not recognized.

Q. Thank you. Would you take your seat, Doctor.

* * *

[Vol. 22-B] [Oral Argument — Jury Instructions and Verdict Form (Mar. 23, 1999)]

* * *

[Tr. 55] in that case.

And the defendant had made the same argument below. I don't know why they didn't make it again for the Court of Appeals, but the doctor could not point to one specific thing.

I think the evidence is quite clear that defendant took a position as a part of a tobacco industry and occasionally on its own, and made statements that every juror could have repeated to do you before this case began.

What's the tobacco company's position? Either cigarettes don't cause cancer or those who are a little more sophisticated remember the half truth the way its said, which is, well, it's a risk factor, or , well, it's not proven, or, well, there is no evidence of it.

That position was pervasive in our culture, and was well known to everyone including Jesse Williams, that's exactly what he became persuaded of. So to say that we can't identify a specific misrepresentation is simply to say that there were so many of them, of course, that no one could, other than a student of this particular kind of litigation.

We have provided those kinds of

* * *

[Tr. 91] this ruling in connection with this particular instruction, Your Honor, but there was argument to the effect that since they had to prove their injuries arose out of smoking cigarettes after September 1988, we had to prove, that is, defendant had to prove that they were negligent in connection with cigarettes purchased after September of 1988.

Your ruling was no — what's sauce for the goose is sauce for the gander.

THE COURT: I am relying on the statutory language, 30.905, which requires that, "A product liability civil action," of which this is one is, "shall be commenced not later than eight years after the date on which the product was first purchased for use."

So at seven years and 364 days, a product sold and purchased which caused harm to the plaintiff or which was a substantial factor in the cause of harm to the plaintiff could be timely, so long as all the other elements of the claim are met.

And it's my belief, as we talked about before in connection with what Mr. Randles

* * *

[Vol. 22-C] [Oral Argument — Punitive Damages (Mar. 23, 1999)]

* * *

[Tr. 68] consider the harm caused elsewhere?

Mr. COON: The Oregon statute says you can consider the likelihood that serious harm would arise, profitability, degree of the awareness, duration of misconduct.

It is just not the duration of the misconduct that caused harm to Jesse Williams. It is the duration of the misconduct that caused harm to other people. We should be clear, there is harm to other folks, and then there is harm to other folks outside Oregon.

I don't think maybe the defendants are arguing harm to other people in Oregon, I think they are arguing about what might have happened to people outside of Oregon.

THE COURT: What part of your 34, Mr. Beattie, is directed to this Gore v. BMW?

MR. BEATTIE: Much of it, Your Honor.

THE COURT: Tell me where to look.

MR. BEATTIE: This one aspect is addressed on Page 3 at Lines 1 through 6, carrying over from Page 2. But most importantly at 5 and 6 where I have alternative highlighted, "You are not to punish the defendant for the impact of its conduct on individuals in other [Tr. 69] states" and that works into reviewing plaintiff's requested jury instructions states the statutory standards.

On No. 1, "The Likelihood" — and I'm reading from the bottom of Instruction No. 34 on the first page. "The likelihood at the time that serious harm would arise from Defendant's misconduct." For it to meet the constitutional requirements, it should say, "The likelihood at the time the

serious harm would arise in this state for defendant's misconduct."

On 3, "The profitability of defendant's misconduct in this state." Both of those, 1 and 3, have to be state-specific under BMW v. Gore. Otherwise, you would be punishing them for harms to other people outside of Oregon that may not be punishable in those states.

THE COURT: Okay. So you are suggesting that Elements 1 and 3 need the modifier "in this state." What else needs to be done to the statutory elements under your version of the constitutional requirements?

MR. BEATTIE: I think that the elements also have to have something in them that instructs the jury that there should be a [Tr. 70] reasonable relationship between the harm caused to Jesse Williams, the amount awarded plaintiff, and the amount of punitive damages. This is at the bottom of Page 2.

THE COURT: What's the origin of that argument in terms of authority?

MR. BEATTIE: This is another Gore v. BMW. And I have to confess this is generally addressed post-judgment — post-verdict, at least, in determining whether the amount of punitive damages is constitutionally excessive.

But the cases also state that the same factors that the Court considers in determining whether punitive damages award is constitutionally excessive are or can be the same factors considered by the jury in calculating the award in the first place.

THE COURT: Maybe I'm being too pragmatic here, but don't we have punitive damage instructions that have survived scrutiny post-whatever --

MR. COON: Post-Oberg, we have.

THE COURT: — in Oregon, that would give me some assurance that I'm not just following a statute blindly, but meeting the constitutional [Tr. 71] issues that have been addressed and resolved by our appellate courts?

MR. COON: We don't have — Gore is a '96 case and —

THE COURT: Gore is from Alabama, U.S. Supreme Court, constitutionality issues. I was hoping we could start first by addressing our Oregon Constitution. What we have got here is that our appellate courts have already said is okay before we —

MR. COON: This is an issue, as the Court probably knows, through Oberg, it is something that Oregon courts have done with their own statute, which was then amended in 1995. And it turns out not to be an Oregon constitutional thing, because there is no due process clause in the Oregon Constitution.

THE COURT: And you had to come here, Mr. Randles.

MR. COON: Without due process. It gets right to the Supreme Court.

THE COURT: Never mind.

MR. COON: One thing that Jay says is important. Many things are important, but one I noticed was that this — these factors, these [Tr. 72] four factors are ones that the Court in Gore apparently, and according to Parrott v. Carr Chevrolet, the Court of Appeals applied post-judgment, or maybe the trial Court applies post-verdict.

So this question of proportionality — one of the other factors is what are the other penalties out there and how does this stack up for any criminal penalties for this conduct that might exist, a factor that I'm not sure that anyone can coherently argue is good grist for jury instruction. That's one of the three Gore factors. One is proportionality, how big is this

compared to damages, and one is reprehensibility to the conduct.

THE COURT: Let me stop first and go back to the proportionality point you're making. Is there case law that says that the trial Court shall, in order to have a constitutional instruction, tell the jury about proportionality?

MR. BEATTIE: It has always been addressed post-verdict.

THE COURT: That's where I'm going to address it then. Unless you can show me that [Tr. 73] there is authority that I have to do it for the jury, why wander where no judge has been told to go before?

MR. BEATTIE: I think it is an accurate statement of the law and in the instruction. I certainly understand your view.

THE COURT: I am just trying to be safe. If there is no case law that says I need to do it to be constitutional, and if there is a punitive award, it is a standard I have to evaluate with guidance and briefing from both sides, obviously, I will do that. Unless it is required for the jury, they have got plenty to consider.

So that would be your Element 1 on page 2, Mr. Beattie; is that right?

MR. BEATTIE: That has to do with proportionality. It also has a second prong. It says, "You may consider the extent of harm suffered by others in determining what the reasonable relationship is. You are not to punish the defendant for the impact of its alleged misconduct on other persons who may bring lawsuits of their own in which other juries can resolve their claims and award [Tr. 74] punitive damages for those harms."

This is sort of a State ex rel Crookham sort of rush-to-the-courthouse issue where the defendant is simply trying to make sure, on one hand, that the first person in line doesn't

get all of the damages to the exclusion of everybody else. But then, on the other hand, wants to make sure that the defendant is not being punished in this case for alleged harms that other persons can recover for in their own right.

So to the extent in this case they are claiming we should be punished because other persons have been harmed, and you should take into consideration those particular harms, that's not for the jury to consider because those persons themselves can recover.

THE COURT: But the goal of punitive damages is punishment and deterrence in the future; punishment for past misconduct of the defendant and deterring conduct that will hurt those other potential litigants in the future, too, so it is not necessarily resolvable that way.

MR. COON: I guess the way I would [Tr. 75] respond to that, the seven factors in the statute the Legislature had said, "These are the factors, and No. 7 is how much you have paid other people."

So what the Legislature has said is we should look back and see, had this defendant been tagged by other juries for other punitive damage amounts? But it does not say other amounts that might be awarded in the future. And the Legislature —

THE COURT: Well, I know that statute doesn't say that. What I am trying to give due consideration to is whether there is a constitutional standard that I'm obliged to invoke here for the jury's consideration in terms of what they are considering.

It seems to me that, first of all, our Legislature has considered total deterring effect and other punishments. And where there is evidence about that, obviously the jury needs to be instructed on.

In this case, unlike — for example, like the Purcell case, we did have a defendant which had been the subject of other punitive damage awards and chose to litigate that, brought in [Tr. 76] evidence that we had been punished enough and argued to the jury we have been punished enough, and the result was what the result was, and maybe that helped. We don't know, in the end, whether that made the jury go up or down.

But in terms of instructing the jury that when they punish, they shouldn't be compensating for other claimants who haven't yet come to court, to me, that is addressed in part because we are first — we have already told the jury that punitive damages are not compensatory damages.

I would maybe say — instead of saying "intended to compensate plaintiff," I might say "compensatory damages." They are not compensatory. They are punitive. They are designed to punish and deter and, therefore, they are not designed to compensate for other plaintiffs who aren't here, and they are not designed to compensate this plaintiff. They are designed to punish and deter.

So I guess what I'm saying, this seems repetitive to me in that regard, the second half of your Item 1 at the bottom of page 2.

MR. BEATTIE: Well, it really isn't. [Tr. 77] What we're saying in that paragraph, you shouldn't punish us for harms to other persons who can bring their own claims for punitive damages and not compensatory damages per se.

So in calculating the amount of punitive damages under the statute — and let me be candid at this point here. I understand that you are bound by the statute at this point. I suppose you could declare the statute unconstitutional at some level, but under the Oregon statute that is in the proposed jury instruction the plaintiff has proffered, this element is not there.

THE COURT: Is there case law that says this element has to be there for the jury?

MR. BEATTIE: Not directly, no. It is another one of the considerations that the Court looked at in the BMW case and a number of others.

THE COURT: I think the risk is adequately guarded against by telling the jury punitive damages are not designed to compensate any one plaintiff or any one — if you want to maybe introduce "compensate plaintiff or anyone else for damages caused by defendant's conduct," [Tr. 78] if that gets you where you need to be. They are designed to punish and deter.

MR. BEATTIE: Okay.

THE COURT: Do you want to introduce the phrase "or anyone else," — "compensate plaintiff or anyone else," or are you satisfied with "plaintiff" alone there?

MR. BEATTIE: I would go with the phrase "or anyone else."

THE COURT: Is there error with that?

MR. COON: No error.

THE COURT: So I think I have satisfactorily worked my way through your Element No.1. What other parts of your instruction —

MR. BEATTIE: I'm sorry to keep going backwards.

THE COURT: Hold on. Mr. Randles wants to jump in.

MR. RANDLES: Did we resolve the other states question?

THE COURT: No, we haven't. I have written it in parenthesis yet. I am trying to work myself through all the other pieces and see what is missing and what I am obliged to give

* * *

[Vol. 23-B] [Plaintiff's Closing Argument (Mar. 24, 1999)]

* * *

[Tr. 91] lives of other people who need whole truths.

When you determine the amount of money to award in punitive damages against Philip Morris, think about the evidence, think about the years. It's fair to think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. It's more than fair to think about how many more are out there in the future.

You're not going to, under the limitations of the case before you, which one of the rules is you can't award more money than is sought; you can't kill Philip Morris, and we wouldn't ask you to. You can't do serious harm to Philip Morris. You can't make them bleed.

But you might get their attention, and you might make them trot off down the right trail after this trial is over. That's our hope; that's the measure of justice we ask you for, and I wish you the best in your endeavor. It will be hard work.

Thank you.

THE COURT: Thank you, Mr. Gaylord.

Jurors, I remind you that you must avoid any press coverage of this case until you

* * *

[Vol. 24-C] [Plaintiff's Rebuttal Argument (Mar. 25, 1999)]

* * *

[Tr. 96] manufacturer that has a product that kills 400,000 people a year.

MR. DUMAS: Objection, Your Honor.

MR. THOMAS: I'm talking about reasonableness, Judge.

THE COURT: Objection sustained.

MR. DUMAS: Thank you.

MR. THOMAS: What I want to do is to show you what is the undisputed proof about the net worth of Philip Morris, which is the part of the jury instruction that you are to consider under the term "financial condition."

Remember Dr. Bassett, the economist. Philip Morris chased him all over. That was one of the most aggressive cross-examinations of an economist that I have ever seen that Mr. Dumas conducted.

I have to say that you scorched that guy, Mr. Dumas, but the fact of the matter is, he held up. He had good proof. And the figure is $17 billion is the net worth of this company.

In terms of what $100 million, which is the ceiling above, which you cannot go in this case, bears as a ratio to the net worth of Philip Morris is a dime to a figure of $17. Or [Tr. 97] one-tenth of a dollar to $17.

That is the ratio of the punitive damages claim in this case. You have to decide what is it that has to be done to demonstrate to this company and others who are watching that this — that this — that this — this is not okay.

What's it going to take? I suggest to you that the mule analogy that Bill Gaylord gave you yesterday was a pretty good one.

In Oregon, how many people do we see outside, driving home, coming to work, over the lunch hour smoking cigarettes? For every hundred, cigarettes that they smoke are going to kill ten through lung cancer. And of those ten, four of them, or three of them I should say, because the market share of Marlboros is one-third of the market.

Market share of Philip Morris is almost 50 percent of that. But three of the hundred are going to die from smoking Marlboros. The other seven are going to die from something else. Another Philip Morris brand? Brown and Williamson? R.J.R.? They aren't here.

But in terms of the calculations of what this product does for people, you know, you hear [Tr. 98] the term associated with jury service, conscience of the community. A jury has got a grave responsibility.

In criminal cases, a sentence of imprisonment. In a civil case, the most you can do is a sentence of money. And in this case money is what Philip Morris is going to understand, and it's the message that they are going to hear most.

The last thing I said to you when we started this case was, the justice in this case that you render, if you do your job right, if you work hard, is going to be the best product Mrs. Williams; Mr. Gaylord; me; my partner, Jim Coon; Chuck Tauman; Freida; Joanne; Glenn, will take. It's your decision.

THE COURT: Jurors, we'll be in recess until 9 o'clock tomorrow at which time I will instruct you regarding the law that applies to the case and then you'll be retiring to deliberate.

Get a good night's sleep. Don't discuss the case. Leave your notes on the chair. See you tomorrow at nine o'clock.

* * *

PLAINTIFF'S EXCERPTS OF RELEVANT TRIAL EXHIBITS IN THE CIRCUIT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH

[Plaintiff's Exhibit 5]

A Frank Statement to Cigarette Smokers

RECENT REPORTS on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings.

Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research. However, we do no believe that any serious medical research, even though its results are inconclusive should be disregarded or lightly dismissed.

At the same time, we feel it is in the public interest to call attention to the fact that eminent doctors and research scientists have publicly questioned the claimed significance of these experiments.

Distinguished authorities point out:

1. That medical research of recent years indicates many possible causes of lung cancer.

2. That there is no agreement among the authorities regarding what the cause is.

3. That there is no proof that cigarette smoking is one of the causes.

4. That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed the validity of the statistics themselves is questioned by numerous scientists.

We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business.

We believe the products we make are not injurious to health.

We always have and always will cooperate closely with those whose task it is to safeguard the public health.

For more than 300 years tobacco has given solace, relaxation, and enjoyment to mankind. At one time or another during those years critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence.

Regardless of the record of the past, the fact that cigarette smoking today should even be suspected as a cause of a serious disease is a matter of deep concern to us.

Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer:

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies.

2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE.

3. In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities.

This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it.

TOBACCO INDUSTRY RESEARCH COMMITTEE

5400 EMPIRE STATE BUILDING, NEW YORK, N.Y.

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[Plaintiff's Exhibit 10]

Shuns Meet

said. "The governor's office is not the place."

Many residents in the area surrounding the Anoka airport are opposed to expanding the airport for Air National Guard jet planes.

"Where the additional facilities for the defense installations are to be located in the metropolitan area is not my decision to make," the governor wrote.

Hannaff

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LIFE ON MARS SU

By BOB HANSON

Compiled and Edited from Pioneer Press News Services

Do little men really live on Mars?

Scientists will try to find out June 30 when the planet con within a paltry 60 million miles of the Earth. Best scientific gu now: Plant life, maybe. Little men, no, no matter what the tion writers say.

That's the report of the International Mars c mittee, meeting in Washington to plan for the gr event. Other things they hope to determine weather. The precise diameter of Mars. More ex measurements all around.

Science

THE CIGARET industry would "stop business tomorrow" if it thought its product was harming smokers, according to George Weissman, vice president of Philip Morris and Co., in a speech in Chicago Tuesday. He blames the cancer problem on "medical propaganda . . . by a small number of doctors and a large number of magazines and newspapers."

• • •

THE U. S. government this week will try out a plan to sell stamp collectors the canceled stamps it gets on incoming worldwide mail in hopes of adding a few extra dollars to the Treasury. . . . ABOUT 186 television stations in 53 cities will be able to present color programs by early 1955, it was estimated in Washington Tuesday by NBC officials.

U.S.

ONCE a notorious bootlegger, Abner (Longie) Zwillman says he'll help finance a "million-dollar project" to wipe out the Newark, N. J., slums in which he was born. The 50-year-old

LIBERACE, controversial m of vand prankst

TRIAL EXHIBIT 18,499

tore out the mailbox. His mother reported the incident to police.

Pegg

PEGGY ANN GARNER, blond star of "The Moon is Blu now on the road, pleaded gu for failure to answer three traffic tickets in New York and was fined $55. "I was never so scared in my life," she s . . . BEVERI PACK, 20-ye old "Maid Cotton" of 19 left New Yo by plane London on a two-week Europe tour . . . BARBARA GRAY A

Peggy

Beverly

BEST AVAILABLE COPY

[Plaintiff's Exhibit 11]

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

JOANN WILLIAMS-BRANCH
Personal Representative for
the Estate of JESSE D. WILLIAMS, Deceased

Plaintiff,

v.

PHILIP MORRIS INCORPORATED and
FRED MEYER, INC.,

Defendants.

NO. 9705 03957

PHILIP MORRIS INCORPORATED'S RESPONSES TO PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS

Defendant Philip Morris Incorporated ("Philip Morris"), by its attorneys, hereby responds to Plaintiff's Second Request for Admissions ("Requests") as follows:

GENERAL OBJECTIONS

a. Philip Morris objects to these Requests to the extent they attempt to impose obligations on Philip Morris other than those imposed or authorized by the Oregon Rules of Civil Procedure and/or any other applicable order of this Court.

b. Philip Morris objects to certain of these Requests on the ground that they ask Philip Morris to admit that certain quoted or referenced language appears in [P. 2] documents, which are never quoted in their entirety, without providing sufficient information to allow Philip Morris to identify the

particular document about which Plaintiff is requesting an admission. Philip Morris has attempted, in response to these Requests, to identify documents in its possession that contain the quoted or referenced language. However, in making these responses, Philip Morris does not admit or deny the authenticity or admissibility of these documents. Phillip Morris also does not represent that its responses to these Requests would be the same if it had a copy of the document that Plaintiff had in mind when Plaintiff framed the Requests because, among other things, there may be more than one document that contains the language quoted or cited in these Requests. Philip Morris reserves the right to assert applicable evidentiary, privilege and other protection objections to these documents and does not waive its claim of privilege or other protection objections to these documents in the future. Philip Morris has not waived, and does not waive, its claim of privilege or other protection and evidentiary objections with regard to any such document. Furthermore, Philip Morris does not waive, and cannot waive, the claims of privilege or other protection and evidentiary objections of others.

c. Philip Morris objects to these Requests as vague [P. 3] and ambiguous as to the meaning of the term "authentic" used by Plaintiff, because Rule 901 of the Oregon Rules of Evidence refers to what the proponent claims the document to be, and these Requests do not state what Plaintiff claims each document to be. Moreover, Philip Morris objects to these Requests on the grounds that they are overly broad and unduly burdensome, and seek information that is neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence. Further, Philip Morris objects to the Requests because they impose an undue burden on Philip Morris by requiring it to admit or deny authenticity of documents that Plaintiff has not yet selected for use at trial or in a manner that would implicate their authenticity.

d. Philip Morris reserves the right to assert additional objections to these Requests as appropriate and to supplement these objections.

These General Objections are incorporated into each of the following responses to Requests, and the General Objections shall be deemed continuing as to each Request and are not waived, nor in any way limited, by the following responses.

RESPONSES TO REQUESTS

REQUEST FOR ADMISSION NO. 27: In or about 1954, Parker McComas, then chief executive officer of Philip Morris, acting as chairman of the Tobacco Industry Research Committee, stated that [P. 4] "If the industry leaders really believed that cigarettes caused cancer, they would stop making them."

RESPONSE: Philip Morris objects to the phrase "acting as chairman" on the grounds that it is vague and ambiguous. Subject to and without waiving its specific and General Objections, Philip Morris admits that the following language is attributed to O. Parker McComas, then Philip Morris President and chairman of the TIRC, in a 1954 magazine article: "If the industry leaders really believed that cigarettes cause cancer, they would stop making them." Philip Morris denies that this language is quoted in context.

REQUEST FOR ADMISSION NO. 28: In 1962, Philip Morris president Joseph Cullman told the Philip Morris annual stockholders meeting that, if there were a connection between cigarette smoking and human disease, defendant would not be in the business of making and selling cigarettes.

RESPONSE: Subject to and without waiving its General Objections, Philip Morris states, after conducting a reasonable inquiry, it denies that the language referred to in this Request appears in then Philip Morris President Joseph F.

Cullman's 1962 address at the Philip Morris annual stockholders meeting.

REQUEST FOR ADMISSION NO. 29: In or about 1963, Philip Morris executive assistant James Bowling told Thomas Whiteside, a reporter for the *New Yorker*, that the tobacco companies "believe there is no connection" between smoking and disease, "or we wouldn't be in the business."

[P.5] RESPONSE: Subject to and without waiving its General Objections, Philip Morris admits that the quoted language is attributed to James Bowling, then Director of Public Relations, in an article appearing in The New Yorker in or about 1963, but denies that this article is quoted in its entirety.

REQUEST FOR ADMISSION NO. 30: Exhibit A, attached hereto, is a true and authentic copy of Exhibit 10,322 offered and admitted in *State of Minnesota v. Philip Morris, Inc., et al*, number C1-94-8565, a report entitled "Smoking and Health Significance of the Report of the Surgeon General's Committee to Philip Morris Incorporated," dated February 18, 1964 and authored by Helmut Wakeham.

RESPONSE: Subject to and without waiving its General Objections, Philip Morris admits that Exhibit A is a true and authentic copy of document number 1000335612/5625, a document authored by Helmut Wakeham, found in the files of Philip Morris, with the exception of the stamps marked "Trial Exhibit 10,322" and "Exhibit A-1" through "Exhibit A-14," which do not appear on the document as it exists in the files of Philip Morris. Philip Morris further admits that Exhibit A is a true and authentic copy of Exhibit 10,322 offered and admitted in *State of Minnesota, et al. v. Philip Morris, Inc., et al.*, with the exception of the stamps marked "Exhibit A-1" through "Exhibit A-14," which do not [P. 6] appear on the document as admitted in the State of Minnesota case.

DATED this 30th day of November, 1998.

LINDSAY, HART, NEIL & WEIGLER, LLP

By:
James L. Dumas, OSB No. 77167
John D. Kimmerlien, OSB No. 95537
Attorneys for Defendants

TRIAL ATTORNEY: James L. Dumas [P. 7]

[Plaintiff's Exhibit 32]

Dr. M. W. DuPuis July 24, 1958

C. V. Mace

Brief comments on a program to produce a low delivery filter cigarette with flavor.

Inasmuch as the evidence (See bulletin of Cancer Progress March–April 1958, Vol. 8, No. 2) is building up that heavy cigarette smoking contributes to lung cancer either alone or in association with physical and physiological factors such as air pollution, pre-disposition, nervous tension, rate of living, etc., I believe we should increase the departmental effort, both in terms of short range and long range objectives, towards the development of a low delivery cigarette having good flavor. Now what should the short range and long range objectives be, and how should we go about it?

For short range, let's concentrate on means to produce a substantial reduction in tar delivery, even if it is only across the board, since the chance is good that any specific irritant and/or carcinogen, if present, would be reduced also. For long range, let's study means for identifying carcinogenic substances as well as all substances in cigarette smoke that are irritating or are known to produce undesirable physiological effects, and find means of removing them. If the latter appears to be impossible, let's develop a non-tobacco cigarette which doesn't have them to begin with. Now, how should we go about it?

For short range, let's increase the effort on the development of a better filter, giving slightly less priority to ventilation, tobacco catalysts and tobacco extraction. At the same time, let's increase the effort on the flavor program since this must proceed simultaneously with the filter program. Further, since there is evidence that rubber-like odors (isoprens)

in the gas phase become more pronounced as the smoke solids are reduced, a charcoal absorbing filter (part of a multiple component filter) may be necessary, unless the odor can be masked by the addition of certain flavors.

The short range program could be carried out most efficiently, I think, by setting up a group in the Research Division to determine the best chemical and physical principles or combinations of the two to produce an efficient smoke filter. This would be a fundamental group, and would be concerned primarily with surface-chemistry and with developing the best chemical and/or physical principles required to filter cigarette smoke completely with a small resistance to air flow. Information obtained here would be passed along to the filter group in the Development Division which would be responsible for developing and constructing prototype filter models and evaluating them, based on the fundamental studies.

[P. 2] The long range program would grow out of the studies being carried out by the fundamental filter group as well as the other groups of the Research Division working on smoke chemistry. The fundamental program could be broadened to include the study of tobacco additives (catalyst), tobacco extraction and finally an all synthetic aerosol to replace tobacco smoke, if necessary. Simultaneously, other sections of the Research Division should be making a strong effort to develop means to evaluate the physiological effects of smoking. Initial studies could be carried out with animals or certain animal tissues known to be irritated by cigarette smoke, and known to be susceptible to cancer when exposed to known carcinogens. The effect of known carcinogens, both alone and in the presence of cigarette smoke, could be studied on the animals or tissues to determine whether cigarette smoke behaves like a co-carcinogen. Further experiments could be conducted with cigarette smoke to see if it has direct carcinogenic activity. Simultaneously with these,

the irritating effects of cigarette smoke should be studied, both on animals and humans.

In addition to these, exploratory studies could be made on humans to determine why people smoke. Dr. Baer of the Food & Drug Research Lab has some pretty good ideas as to how to go about this, and he is writing them to us. More about this at another time.

I know this sounds like a wild program, but I'll bet that the first company to produce a cigarette claiming: a substantial reduction (say 50% less than the present Parliament and Kent) in tars and nicotine, or an ersatz cigarette whose smoke contains no tobacco tars, and with good smoking flavor, will take the market. Further, if he has the intestinal fortitude to jump on the other side of the fence (provided he has some convincing experimental evidence to back him up) on the issue of tobacco smoking and health, just look what a wealth of ammunition would be at his disposal. Of course, we would have to be careful to infer that the reason for the change in dress was the continuing evidence linking cigarette smoking with health, and that although the evidence is not altogether irrefutable we have decided upon this course of action in the public interest. In this way, we have protected our bridges behind us because we have not admitted there is a direct relation between smoking and health, and we are building new bridges ahead which we will need if there is a flood, but which we will not need if there is no flood. In other words, we are planning for the worst; and in the event it proves unnecessary in the future, the experience gained should be useful for other purposes.

[Plaintiff's Exhibit 39]

PHILIP MORRIS INCORPORATED

INTER-OFFICE CORRESPONDENCE

RICHMOND, VIRGINIA

To: • Dr. R. B. Seligman Date: June 3, 1960

From: • L. L. Long

Subject: • May 24th Project Review — 1960 Cigarette

During the discussions on the 1960 Cigarette, the following ideas were presented:

1. A method for increasing the nicotine content of cigarettes was discussed. The results to date show an increase in the smoke delivery of total alkaloids proportional to the amount of nicotine maleate added. It was suggested that we may improve the smokability of BL by increasing its nicotine content in this manner. It was further suggested that we check the smoke alkaloids from cigarettes treated with the nicotine maleate to determine which alkaloids are being measured.

In evaluating a cigarette with a 14 mg TPM delivery and a 1 mg of nicotine delivery, it was suggested that we have the smoker smoke a full cigarette for build up effects and further to conduct pack hand out tests. Aftertaste was mentioned as something to be observed in such tests also.

2. During the discussions on paraffin wax treated fillers, it was suggested that we extinguish partially smoked cigarettes, then disect them for microscopic analysis. This type of examination may reveal the nature of the mechanism which causes the large increase in RTD during smoking.

3. The final point of interest was one concerning the project objective. It was suggested that the project objective

may not be broad enough and that perhaps it should be changed to cover several different categories of cigarettes. However, it was generally conceded that any or all of the different categories of cigarettes. (such as mentholate cigarettes with carbon plugs, controlled nicotine level at various TPM's, etc.) would fall out of the current project.

/aj

cc: Dr. L. S. Harrow

Mr. J. W. Geiger

Mr. G. E. Shaffer, Jr.

Mr. J. D. Hind

Mr. J. Y. Mason, Jr.

Mr. J. O. Millham

[Plaintiff's Exhibit 44]

PHILIP MORRIS INCORPORATED
INTER-OFFICE CORRESPONDENCE

RICHMOND, VIRGINIA

To: • Dr. R. H. Blackmore Date: March 19, 1962

From: • R. M. Wiley

Subject: • High Nicotine to T.P.M. Ratio of All R. J. Reynolds Brands

In compliance with Mr. Hugh Cullman's letter to Dr. Wakeham requesting that we investigate possible means used by R. J. Reynolds to achieve the high nicotine to T.P.M. ratio present in all of their brands, the following possibilities are set forth:

1. Blend
2. Humectants
3. Extraction or additives
4. Paper

1. It would be possible to control the necessary variables through blending. This approach was investigated to a considerable extent, but the large number of variables (year-to-year, belt-to-belt and grades within belts) precluded any valid formulation of blend. (See Table I in the Appendix) However, the alkaloid content in all of Reynolds brands is at the high end of the scale. This does not say that this is entirely responsible for the high nicotine to T.P.M. ratio and it does not preclude their adding nicotine to the blend. Also, there is not enough known, technologically, to be able to tell if the nicotine has been added or if it was present in the natural state.

2. The humectant, propylene glycol, has a direct bearing on the nicotine to T.P.M. ratio as can be seen on the graph

designated as Table II in the Appendix. As the humectant level is reduced, the nicotine to T.P.M. ratio increases. Possibly the ratio is achieved through the combination of blend and humectant. At present we have no reason to believe that this does not hold true for other humectants such as glycerine, but we do not have any experimental data at this time.

3. Another possible approach could be through extraction of the filler and/or addition of nicotine to the filler to obtain the desired level. Preliminary work in the area of extraction with various solvents has shown that in general the nicotine and T.P.M. delivered is reduced. Selective solvent extraction would effect a greater percentage reduction in T.P.M. than nicotine delivery. Additionally, if nicotine were added to the extracted filler, probably in the form of nicotine molate, the T.P.M. level would not increase as much percentage wise as the nicotine level. Hence, the ratio of nicotine to T.P.M. would be raised. [P. 2]

4. The effect of paper on this ratio is less marked but may have a bearing on the matter. R. J. Reynolds made a cigarette paper change to a more porous paper in all of their brands at the time the high ratio was first observed. A partial additive effect may have been gained. That is, where the paper change alone was not sufficient to affect the nicotine to T.P.M. ratio observed, it would add to the overall effect of other changes that were made — possibly humectant and blend.

An analysis of available data on additives (such as Aluminum Oxide) gave no indication that the ratio of nicotine to T.P.M. was elevated by the introduction of additives. This does not preclude the use of additives by R. J. Reynolds, but our state of the art has not progressed to the point where we can achieve an effect on the nicotine to T.P.M. ratio through the use of additives.

The following are investigations that could be pursued to enhance our knowledge of the means of effecting a high nicotine to T.P.M. ratio.

1. Analyze many humectants to determine their effect on the nicotine to T.P.M. ratio.

2. Study the effect of various additives on the nicotine to T.P.M. ratio.

ra /s/

cc: Dr. A. Bavley (3)

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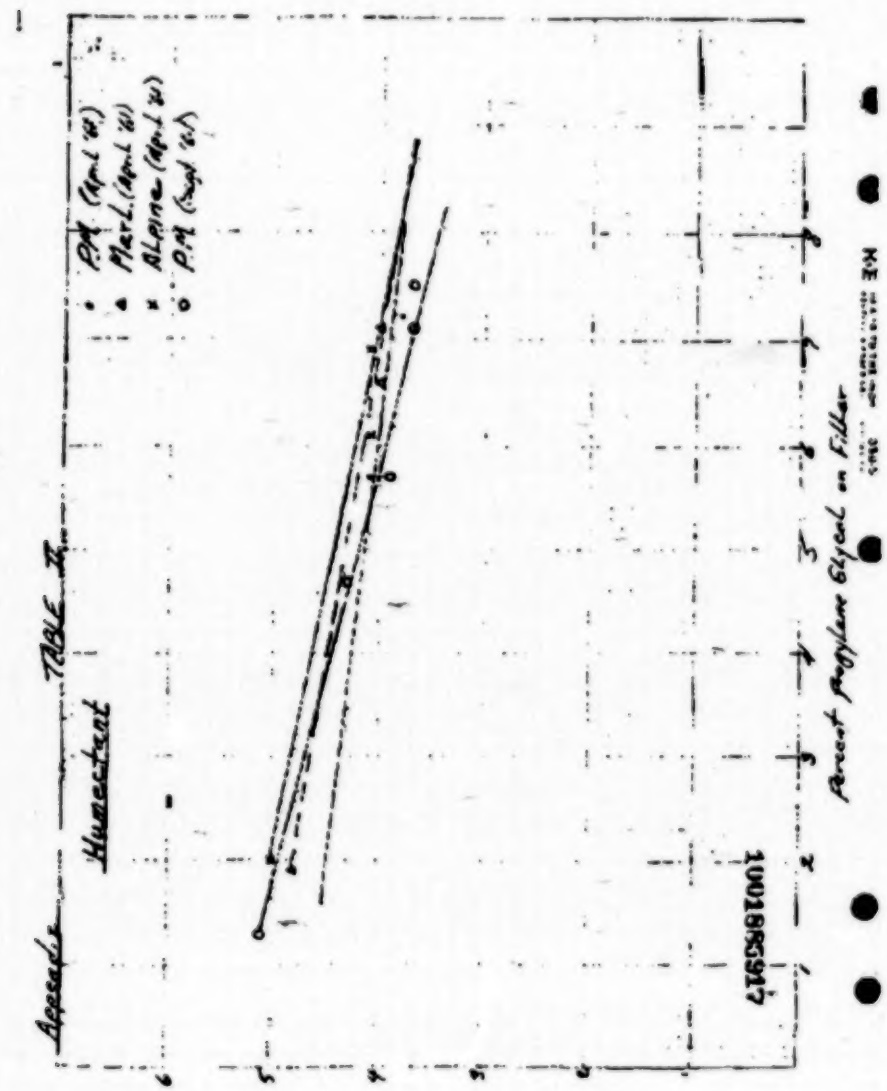

TABLE I

APPENDIX															
	Nicotine Content of Burley and Bright Tobacco Leaf (Percent)														
Type	1956			1957			1958			1959			1960		
Burley	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.
Belt	2.85	3.43	2.17	3.49	4.05	2.71	2.10	3.18	1.30	2.95	3.92	2.29	3.12	3.98	2.32
Total Sales – Lbs.	482 mil. lbs.			4.78 mil. lbs.			483 mil. lbs.			499 mil. lbs.			508 mil. lbs.		
Bright Belts	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.
Georgia	1.71	1.87	1.42	1.87	2.13	1.64	1.58	1.79	1.46	1.41	1.53	1.30	2.04	2.52	1.86
Border	2.11	2.48	1.87	2.51	2.97	2.02	1.67	2.37	1.26	2.17	2.60	1.75	2.38	2.85	2.03
Eastern	1.77	2.13	1.60	3.34	3.75	2.65	2.16	2.53	1.54	2.39	2.64	2.00	2.00	2.59	1.46
Middle	1.79	2.15	1.61	2.97	3.95	1.97	2.25	3.20	1.45	2.30	2.60	2.07	2.49	2.75	2.21
Old	2.17	2.51	1.72	3.10	3.62	2.58	2.51	3.21	1.86	2.51	2.67	2.18	2.64	2.86	2.26
Crop Avg.	1.91	2.23	1.64	2.76	3.28	2.17	2.03	2.62	1.51	2.16	2.41	1.86	2.31	2.71	1.96
	Total Sales – Mil. Lbs.														
Georgia		183			120			134			161			183	
Border		333			254			263			279			311	
Eastern		508			353			402			359			444	
Middle		179			124			137			136			170	
Old		333			235			250			250			262	
Total		1,536			1,086			1,186			1,185			1,360	

TABLE I

[Plaintiff's Exhibit 50]

Mr. Joseph F. Cullman 3rd January 29, 1964

George Weissman

Surgeon General's Report

Inasmuch as I am leaving soon and am involved in preparations for my trip, I thought I would pass on to you some of my thoughts regarding the recent release of the Surgeon General's Report.

I. REACTION

While the propaganda blast was tremendous and the penetration of public opinion very widespread, I have the feeling that the public reaction was not as severe nor did it have the emotional depth I might have feared. Certainly, so far it is not of a nature that caused the prohibitionists to go out with axes and smash saloons nor even of the more recent shock and reaction to the thalidomide scandal.

The individual comments as well as the press reflections are comparatively mild, ranging from a certain light touch, defiance, to the more serious proposals.

Yet even the most serious opponents of the industry have not come up with "life or death" for the industry kind of proposals.

Obviously this reaction is still to be studied and observed, but it leads me to the belief that we can perhaps proceed slower than I might have anticipated a month ago in having the tobacco industry take the initiative in certain areas.

II. PUBLIC RELATIONS PROGRAM

A. The restraint and unity of the industry has been very effective in this period. The opponents have had their inning.

The industry has demonstrated its seriousness and responsibility is saying we would study the Report.

B. However at some point, reflecting the same seriousness with which we met the Report, we must in the near future provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking. Those answers must also point up the weaknesses in the Report and the path for future research.

However it cannot be done under the flag of saying the unanimous opinion of the Surgeon General's Committee is wrong. Therefore I propose that when the white paper analyzing the Report is completed [P. 2] a press conference be called (if possible on an equal time basis with the Surgeon General in the State Department auditorium) in which perhaps Clarence Cook Little and the various industry research directors and scientists and Dr. Hockett and Dr. Franzen, etc., would get up and take the following approach:

"We have studied the Surgeon General's Report which is an excellent comprehensive analysis of previous statistical studies. When it was released the Surgeon General noted that more research was necessary, and after analysis of the Report we find these are some of the areas for which the research is necessary:

1. Page 154 of the Surgeon General's Report recognizes significant beneficial results of smoking primarily in the area of mental health, but goes on to say there are no means of quantitating those benefits and that the Committee had no means of weighing the benefits versus the hazards. In those times when _____ percentage of our population may be effected by matters of mental health, we think the imperative factor is that further research be done in those areas.

2. On page ___ the death rates for smokers are equal to or lower than the general white male death rate in the United States. Obviously this is an area of research.

3. Filters, etc.

4. The technical analysts will obviously have hundreds more items like this indicating research possibilities, contradictions, discrepancies, etc. The main thing I want to emphasize is the approach should be that this fine Surgeon General's Report opens up all those paths to further research.

C. Humor and satire. While it should not be done in the industry's name, someone ought to be contacting all the cartoonists, television gag writers, satirical reviews, etc., to apply the light touch to this question.

D. The most potent political force in America are the media and they will be most directly concerned with this battle. To the extent possible, they should carry a good deal of the ball.

III. LABELING ACTION

In view of the reactions so far to the Surgeon General's Report, I am reversing my previous position that it might be wise for the industry to take the initiative in securing a wild federal labeling act to thwart the efforts of the various states. Perhaps we will have to ultimately make the concession, but in England they have been able to hold it off. [P. 3] Advertising guides, vending and media restrictions are all subject to change in future years, but a labeling act is very permanent.

If we are forced into one, every effort should be made to counterpose the health caution with the statement that the Surgeon General also recognizes significant beneficial effects of smoking primarily in the area of mental health.

If possible, the state legislatures could be held off on the basis that this is a federal matter and the federal can be the subject of many hearings.

In closing, the main essence of the Report and the publicity to me is that it has still left smoking on an individual basis, the individual's own choice of the psychological benefit

versus the alleged hazard. Anything that impinges on the right of the individual to make this choice is contrary to our most basic traditions.

/s/

George Weissman

GW:pec

cc: Mr. P. D. Smith

Mr. J. C. Kowling

[Plaintiff's Exhibit 53]

March 25, 1964

1965 CIGARETTE

PROGRAM OBJECTIVES AND APPROACH

1. Product shall allow satisfactory function of pulmonary clearance mechanisms
   a. Insignificant effect on mucous flow
   b. Removal (90% level) of
      HCN
      HCHO
      Acrolein
      Phenol
   c. Obtain physiological data on Formic acid and croton-aldehyde and finalize analytical procedure for Formic acid.
   d. Acute tests should be run on 2 or more animals, procedures should parallel FDA type tests.
   e. Concentration points should bracket area of actual interest.
   f. Investigate setting up phagocytosis tests for checking and screening candidate sample.
2. TPM Delivery

   TPM delivery level should be $\geq$ 10 mg.
3. Nicotine Delivery

   Nicotine delivery level should be 0.7 mg. minimum.
   a. Investigate purchasing nicotine.

b. Add nicotine to cigarette and define contribution of nicotine to flavor.

c. Can we transfer nicotine from filter to smoke?

4. The product design should include consideration of chemical carcinogens within the following framework

a. The polynuclear analytical method should immediately be made available for selected samples.

b. Investigations should be made of the relationship between high nitrate blends and polynuclear concentrations.

1) Low and High nitrate blends. [P.2]

c. Determine effect of porous vs. regular cigarette paper on polynuclear concentration (polynuclears/mg TPM).

d. Check polynuclear data on cigarettes containing naturally low TPM blends.

5. Adsorbents

a. A selection of specific silicas, carbons, and aluminas will be made and the materials checked for their capabilities to remove the designated undesirable gases components.

b. Chemical means will be investigated for removal of the candidate gases, particularly HCN.

c. Outside research laboratories will be contacted for recommendations in relation to specific adsorbents.

d. Monitor CO in tests.

6. Series T

a. Recommended a dual program encompassing the paper filter alternate be conducted until field tests on Series T are completed.

b. Problems to be resolved with du Pont after field tests

1) How firm a commitment is needed for commercial supply?

2) Notice needed for Test Market Supply.

3) What is best estimate of availability data of commercial supply?

c. Work should begin immediately on design and construction of new Series T cutters.

7. Cigarette Filter Construction

a. Product definition of two candidate triples (less flavor transfer) should proceed immediately with hand samples.

b. Triple sections can vary from 6 2/3 to 10 mm in length, preferably 6 2/3 mm. Total of all three should not exceed 25mm.

c. Triple machines should be delivered early in April. [P.3]

d. It is recommended that the carbon paper filter be omitted if possible from the Series T triple to minimize possible paper taste problems.

e. An overall RTD level of 5.3–5.5 inches of H_2O is considered acceptable, 5.7–5.8 is not considered acceptable.

8. Flavor

a. Adequate flavor is defined as that which gives no preference in tests against brands in the 5 to 10 billion range such as:

Parliament	Old Gold
Tareyton	Raleigh
Lark	

b. Flavor should be put on both filler and filter.

c. Program with flavor houses should be encouraged.

d. Method of incorporating flavor and gas phase activity needs to be defined.

e. Tests on flavor should be run with low TPM filter similar to proposed filter.

9. Tobacco Blend

a. Available TPM can be lowered 25%.

[Plaintiff's Exhibit 72]

* * *

[P. 2] We share the conviction with others that it is the pharmacological effect of inhaled smoke which mediates the smoking habit. Two independent groups of British researchers are basing their programs on this belief.

From the University of London: "Our working hypothesis is that confirmed smokers are those who desire the pharmacological effects of the alkaloids in smoke" (M.S.G. Clark, M. J. Rand and S. Vanov — Arch. Inst. Pharmacodyn. 1965, 156 #2 P. 377).

From Harrowgate: "The Pharmacological research programme of the Tobacco Research Council has so far been basically concerned with the elucidation of the nature and cause of the possible "tranquillizing" and "stimulant" properties of nicotine and tobacco smoke."

We have, then, as our first premise, that the primary motivation for smoking is to obtain the pharmacological effect of nicotine.

In the past we at R & D have said that we're not in the cigarette business, we're in the smoke business. It might be more pointed to observe that the cigarette is the vehicle of smoke, smoke is the vehicle of nicotine, and nicotine is the agent of a pleasurable body response.

* * *

[Plaintiff's Exhibit 80]

Dr. H. Wakeham Seminar Address to R&D — Wednesday, February 17, 1971

MARKED

"WHY ARE WE ALL HERE?"

Friends of the Center:

It is a pleasure to be here this evening, and to greet you again in this eleventh year of our occupation of the Research Center. I had vague hopes at one time of passing this annual presentation to Mr. Clifford Goldsmith. He had in fact agreed to come here tonight. Then about a month ago he begged a postponement to April. So here I am again, for better or worse, as the saying goes.

Some of you have wondered about the title I have given this talk. Frankly, I labelled it in response to a request from Frances McDaniel who posted the notice. At the time I had not thought too much about the nature of the talk, but the title sounded catchy. Someone asked me if it as any religious significance. Well, it comes from a religious story I am sure many of you know — the one about the minister who was in the habit of beginning his sermon with the question "Why are we all here?" This seemed a harmless enough opening until one day he was invited to speak to the patients at the State Hospital for Insane. In thinking about his sermon there he realized that his traditional opening was quite inappropriate. So he diligently practiced and resolved to avoid it. But at the critical moment habit overcame him, and he shouted to the patients "Why are we all here?" A voice in the back of the room replied "Because we are not all there."

I wouldn't be surprised if our friends in other departments sometimes feel like saying we in Research are "not all there." Be that as it may, we are all here, [P. 2] and each of

us had better know why. We must all recognize that in some way or other each of us must be contributing to the attainment of the aims, purposes, and objectives of our Company. If that is not so, then sooner or later our failure to make that contribution will be discovered. Our existence then will be tenuous indeed.

It is no secret that the objectives of Philip Morris, like many other corporations, can simply be stated in profit and growth. These primary objectives have widespread benefits to us as employees, to the stockholders, and to our customers, and to the country at large. Our business in Research is to see to it that our activities and efforts are effective in helping to achieve these objectives. How we might improve in this direction I will discuss later.

Now it might be of interest to review briefly the progress the Company has made during the past year. 1970 was another year of phenomenal growth, especially in view of the attack of the anti-cigaret opponents. In a year when total cigaret sales barely held constant, our U.S.A. sales increased more than 11% over 1969 to the level of over $7 billion. And for the first time, Philip Morris International unit sales exceeded the U.S.A. sales with an outstanding total of 89 billion making a grand total of over 176 billion cigarets. This growth is illustrated in these curves:

SLIDE 1.

Philip Morris is now truly an international company, competing vigorously on a worldwide basis with British American Tobacco and Rothmans.

SLIDE 2.

Here is shown distribution of our international market. In the domestic market, the [P. 3] big winner is Marlboro with a unit sales gain of 16.4%, more than any other brand, and as this chart shows, now the third largest selling brand in America, soon to be second.

SLIDE 3.

This kind of success has pushed Philip Morris-U.S.A. into third place. We will soon be second as the next slide shows.

SLIDE 4.

It is no surprise then that our healthy cigaret business, plus a price increase, plus the addition of business from our diversified lines, has pushed our 1970 consolidated revenues to a breathtaking $1.5 billion, an increase of 32.1% over 1969. We have had an equally good growth in net earnings to 77.5 million dollars, an increase of 32%. To keep up this kind of growth, shown on the next slide, is going to take some doing.

SLIDE 5.

The momentum, especially with Marlboro, is high. We must do everything we can to protect it. I am sure you are all aware that, with all due respect to diversification, cigarets are still our big business.

SLIDE 6.

In July of last year we acquired the remaining half of Miller Brewing Co. so that all of its earnings and revenues added to our totals. But in relation to cigarets, these others are still relatively small, despite the fact that in their own rights they are very respectable businesses.

SLIDE 7.

In fact, last year they did not do as well as we had hoped. General products is still not a profitable area. Miller Beer was better in sales than the previous year, but less profitable because of higher costs and promotional expenses. Mission Viejo felt the depressed economy of Southern [P. 4] California. In sum, the contributions of the diversified elements are large in revenues and small in profits.

It is clear from all this that cigarets is still the main and most important of Philip Morris business. Accordingly, the major part of our effort must be in the same direction. It is, therefore, logical for R&D to be functionally in its present relationship to Philip Morris — U.S.A. as shown in this organization chart of the next slide.

SLIDE 8.

Operationally R&D should lead to new cigaret products which are made for the U.S.A. market in the manufacturing department next door. Another reason is that, generally speaking, product development is pioneered in the U.S. before it spills over into the International sector.

In several ways 1970 has been a noteworthy year for the Research Center. First and foremost, we are beginning to see some real payout to the Company from its R&D Investment. Perhaps the most certain at present is the adoption of our TFP process for making reconstituted tobacco sheet by Philip Morris Australia. Their plant is starting this week. It is estimated that this process will in ten years permit a tobacco savings of 17.7 million dollars. Pretax profit [from TFP] for this period is expected to be 11.7 million dollars. Our research investments for this process is probably in excess of two million dollars. If the payback is five times the cost the venture will be well worthwhile. We have waited long for this application, and hope it will be repeated in other places to further increase our return.

Multifilter cigaret is a product which clearly carries the imprint of R&D, the [P. 5] first of what we hope will be many more to come. In 1970 Multifilter sales were about 3.2 billion units. This was scarcely 0.6% of the market. Yet these sales amounted to nearly 31 million dollars in revenue and a marginal contribution of 4.6 million dollars. Unfortunately, the margin is not all profit. Out of it comes marketing, general administration, and research costs before profit. But the example illustrates the tremendous value of a suc-

cessful cigaret brand. Both the Mark VII and the New Land brands also have the imprimatur of R&D on them. Unfortunately, neither has made a go in the market place. I won't speculate as to the reasons for either. Suffice it to say, both of these were promising candidates. If we can deliver more that have equal promise, sooner or later one will make a strike in the market. Then we will have a major brand to our credit.

Certainly, of current activities, the expanded tobacco program is one of the most promising in terms of reduced costs and profits. At a projected utilization rate of 5% by weight of expanded tobacco in the blend the reduction to tobacco costs could be 20 million dollars per year for PM-USA. The beautiful feature of this program is that it is not subject to the vagaries of the market place. Here we are certain that we will be able to expand tobacco and to get it into the product. The project will be a success. It deserves our utmost effort to assure that the schedule will be met. I will talk about this more later.

Finally, it is noteworthy that the management of Philip Morris has reaffirmed its confidence in R&D by continuing to provide the best of tools and facilities to do our jobs. This last year, as you all know, we installed a powerful computer to upgrade our instrument facility. We also started construction [P. 6] on a fine new laboratory tower which will increase our available space by [over] fifty percent. Our library, our research divisions, and our service groups will have new quarters in that building. We will have a seminar lecture room seating over two hundred. We will also make some changes in the upper floor of this building to provide better quarters for administrative services, a new and larger conference room, and better reception area for our visitors. I have to report that our building program is a little behind schedule, but we still hope to be finished to accommodate the move from the Main Street building by November of 1972.

I might add that by the time all this is finished the total capital investment of the Company in research will have exceeded [fifteen] million dollars.

[P. A] Our management is counting on R&D to provide the technical basis for achieving corporate goals. Now that Philip Morris, with its present momentum in the cigaret business will in all probability be second in 1971, the next goal will be to overtake R.J. Reynolds as the industry leader. This will require us to employ our technical resources to gain product leadership in the industry. Product leadership, in the absence of broadcast advertising, will require product advances with real competitive advantages.

[SLIDE 9.]

Translating this situation into R&D goals I would list the following areas of importance.

1. Basic filter science and applied filter technology. We need to know more about the science of both aerosol and gaseous filtration as applied to the cigaret. We have only touched on [illegible] of fibers, polymers, absorbents, and filter geometry to obtain controlled, selective action in cigaret filters.

2. Control of smoke formation and composition. We have only begun to probe the mechanisms of combustion, pyrolysis, and distillation in the smoke formation process, the effects of burning temperature, tobacco composition, salt components, and cigaret geometry and their effects on smoke composition.

3. Flavor science and subjective response. You have all been aware of the need to increase subjective response to low tar delivery products. You are also aware of the extensive knowledge we have of smoke composition. And yet, we know very little about which constituents contribute positively to the smoker's response, which detract, or which make no contribution. In fact, even for nicotine we are not

confident of the role it plays in our [P B] product acceptability.

4. Smoker characteristics and behavior. We need to strengthen our understanding of the inter-relationship between cigaret smoking and certain psychological, social, life style, genetic, and occupational factors. We need to understand more about why people smoke and what benefits they obtain from smoking.

5. Tobacco utilization. Both reconstituted tobacco and expanded tobacco have extended our ideas about tobacco utilization. When I first came into this business I commented on how ridiculous it was to burn a gram of tobacco, when all the smoker wanted came from one-tenth as much. And yet, when economics forced reconstituted tobacco on us as a way to use byproducts, we learned precious little about the effects of sheet composition, geometry, smoke generation conditions on smoke composition. We were engrossed in the technology, the brute force approach to make the process go. The experience was repeated with TFP. Now we are at again with expanded tobacco. We are discovering how little we know about the raw material in our product. We should remedy that ignorance, before the next technological crisis.

6. Biological effects. We are gradually emerging from the "dark ages" when it was considered harmful to be knowledgeable about the biological effects of smoke and its components. Maybe we have learned from crises past that it is better to be informed about potential dangers then to be silenced by ignorance. How else can we reply to our critics? Hand in hand with our increasing knowledge of smoke composition must go our better understanding of the effects on biological systems. Not with the objective of proving smoke to be harmful or harmless, but from the aim of making our product more acceptable to that complex biological system — the smoke [P. C] Without that kind of guidance, our efforts at controlling smoke composition are meaningless.

7. Non-tobacco cigaret filler. I look on this as a long-range program aimed at perfecting a non-tobacco filler material with smoking characterists acceptable to the smoker. We may never use it, maybe because we may have to prove safety, as with a new drug. I look on it as an insurance item and as a useful research tool in our understanding of the smoker.

So you have here seven main areas of work which are enough to keep us busy for a long time. And yet they are not all. But I have not time to go into everything.

Finally, I want to say a few things about our fold favorite subject — Smoking and Health.

From this standpoint, 1970 might very properly be called the year of the beagle. Early in the year, the American Cancer Society announced that they had finally demonstrated the formation of lung cancer in beagles by smoke inhalation in the now infamous Auerbach and Hammond study. I am sure all of you have read extensively about this in the newspapers, how the industry asked to have an independent panel of pathologists review the histological sections showing cancer, how the Society refused, how generally the ACS was put on the defensive, how publication was refused by two medical journals and how the story was changed somewhat by the time it was published in the Archives for Environmental Medicine. [P. 7] You may not realize the importance of this chain of events for the industry. You will recall that the argument supporting the health condemnation of cigarets is based on two points. First is that epidemiological studies show a strong statistical association between heavy smoking and lung cancer for males. Second is that when the condensate of cigaret smoke is painted on the backs of mice for the better part of a lifetime they develop warts or tumors and sometimes carcinomas. Presumably this latter experiment has given biological support to the statistical evidence and hence "proves" the causation hypothesis. The cigaret indus-

try has assailed the mouse skin study as having no significance to cigaret smoke and human lung cancer. There are at least three things wrong with the test: one is that mouse skin is not human lung tissue. Second is that smoke condensate has different chemical composition from inhaled smoke. Third is that painting is not the method of application practised by human smokers.

The logical extension of these objections is that an inhalation test in which an animal breathed smoke like a human would be a better model system. Presumably in such a test, the formation of lung cancers in the test animal would be strong evidence for the cigaret causation hypothesis. That is why the beagle test was a critical one. To be sure, beagles are not people. Furthermore, in the test they inhaled the smoke through openings in their throats instead of through their mouths or noses. As a result they had high concentrations of smoke near the openings. Then they puffed rapidly and got no telling what kind of smoke. Finally, the so-called tumors were microscopic neoplasms. So the test was not conclusive. But it was a lot closer than skin painting.

The strong opposition of the industry to the beagle test is indicative of a new, [P. 8] more aggressive stance on the part of the Industry in the smoking and health controversy. We have gone over from what I have called the "vigorous denial" approach, the take it on the chin and keep quiet attitude, to the strongly voiced opposition and criticism. I personally think this counter-propaganda is a better stance than the former one. We need to call attention to the exaggerations and lies of the anti-cigaret zealots. We need to give the scholarly reply to the improper studies. We need to stress the benefits that sixty million smokers derive from the use of our products. I believe every smoker has been informed about smoking and health. Those who smoke have made their decision to accept the real or imaginary risks. We need to uphold the right of the smoker to make his own decisions instead of having Government bureaucrats make them for him.

As you know, 1970 was also the year of the new warning label on the package and the last year of TV and radio advertising of cigarets. Just what effect these actions will have on cigaret sales remains to be seen. Certainly the advertising ban will make the introduction of new brands more difficult. But new ways of marketing are being found. We also have the experience of other countries with similar bans that cigaret sales continue as before. We do not, therefore, anticipate a drop in sales as a result of the ban.

One more word about skin painting. It is really unimportant whether this or any other bioassay method involves what we would accept as a proper smoking and health model. The important thing is what the public and especially the medical and legislative public think. If the test has relevance to them, then we must be prepared to cope with it. In this connection we must view the skin painting tests carried out abroad which appear to show that reconstitution of tobacco by certain methods somehow modifies the chemistry of the smoke to [P. 9] give a lower tumor yield in a standardized test. The threat of this kind of a finding challenges us to discover how the chemistry is changed by the reconstitution process. This challenge will require a lot of diligent effort on the part of our analytical chemists.

The demands for new scientific and technological knowledge about our processes and products are never ending. This is the business of research. This is "why we are here." This is our challenge — to use the resources placed at our disposal to contribute most effectively to Company growth and profit.

[Plaintiff's Exhibit 83]

May 1, 1972

MEMORANDUM

TO: Horace R. Kornegay

FROM: Fred Panzer

SUBJECT: The Roper Proposal

GENERAL COMMENTS

It is my strong belief that we now have an opportunity to take the initiative in the cigarette controversy, and start to turn it around.

For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts — litigation, politics, and public opinion.

While the strategy was brilliantly conceived and executed over the years helping us win important battles, it is only fair to say that it is not — nor was it intended to be — a vehicle for victory. On the contrary, it has always been a holding strategy, consisting of

— creating doubt about the health charge without actually denying it

— advocating the public's right to smoke, without actually urging them to take up the practice

— encouraging objective scientific research as the only way to resolve the question of health hazard

On the litigation front for which the strategy was designed, it has been successful. While we have not lost a liability case, this is not because juries have rejected the anti-smoking arguments.

On the political front, the strategy has helped make possible an orderly retreat. But it is fair to say that it [P. 2] has not stemmed the pressure for new legislation, despite the major concessions we have made.

On the public opinion front, however, our situation has deteriorated and will continue to worsen. This erosion will have an adverse effect on the other fronts, because here is where the beliefs, attitudes and actions of judges, juries, elected officials and government employees are formed.

THE STRATEGIC IMPASSE

As an industry, therefore, we are committed to an ill-defined middle ground which is articulated by variations on the theme that, "the case is not proved." As the recent history of U.S. involvement in Vietnam demonstrated, it is impossible to hold the public on a middle course for any length of time. There seems to be no way that mass public opinion can engage in a controversy and choose an answer that goes beyond the range of either/or.

In the cigarette controversy, the public — especially those who are present and potential supports (e.g. tobacco state congressmen and heavy smokers) — must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor.

As things stand, we supply them with too little in the way of ready-made credible alternatives.

THE ALTERNATIVES

Two such credible alternatives exist:

1) The Constitutional Hypothesis i.e. people who smoke tend to differ importantly from people who do not, in their heredity, in constitutional makeup, in patterns of life, and in the pressure under which they live.

2) The Multi-factorial Hypothesis i.e. as science advances, more and more factors come under suspicion

> as contributing to the illnesses for which smoking is blamed — air pollution, viruses, [P. 3] food additives, occupational hazards and stresses.

Our 1970 public opinion survey showed that a majority (52%) believed that cigarettes are only one of the many causes of smokers having more illnesses. It also showed that half of the people who believed that smokers have more illness than non-smokers accepted the constitutional hypothesis as the explanation.

Thus, there are millions of people who would be receptive to a new message, stating:

> Cigarette smoking may not be the health hazard that the anti-smoking people say it is because other alternatives are at least as probable.

The Roper Proposal would be a persuasive (if not strictly scientific) medium for this message, which we have done little to develop in a systematic or comprehensive way.

Following is my outline of the steps required to start a shift in public opinion if the Roper Proposal is accepted.

A SCENARIO FOR ACTION

1) Select a panel of experts to consult on the design of the study. Ideally they would be prestige figures who would initially have a solid contribution to make and who would also be willing to endorse the study publicly at a later stage.

2) Conduct the pilot study.

3) If favorable, present the results to carefully selected members of the following key groups:

Senate

House

Cabinet

White House

State Governors

Medical School and University Presidents

Scientific bodies [P. 4]

The purpose is two-fold (a) to gain the support and participation of friends and (b) to neutralize any adverse action they may be brewing. For example: By seeing Secretary Butz at this time we might gain some degree of participation from the Agriculture Department. By seeing Secretary Richardson we might possibly forestall a PHS anti-smoking drive.

4) Conduct the full scale survey.

5) If the results are favorable, release them as a book in both hard cover and paper back version, hopefully published by a legitimate house. In effect, such a volume would be a counter-Surgeon General's Report. The principal authors would be Burns Roper and an eminent research scientist. The advisory panel — hopefully broadened as a result of Step 3 — would write the introduction. The industry's funding role would be fully acknowledged.

6) As a book the material would be marketed and promoted in all the many ways available: magazine condensation, TV and Radio talk shows, newspaper reviews and interviews, advertising, gift distribution, etc. etc.

And best of all, it would only have to be seen — not read — to be believed...just like the Surgeon General's report.

FP/kc

cc: M. Kastenbaum
W. Kloepfer, Jr.

[Plaintiff's Exhibit 91]

CHARGE NUMBER: 1600

PROGRAM TITLE: Smoker Psychology

PROJECT LEADER: W. L. Dunn, Jr.

PERIOD COVERED: April 1–30, 1974

DATE OF REPORT: May 9, 1974

Project Title: Alpha Brain Waves and Smoking
Written by W.L. Dunn

Nearing completion of data collection.

Project Title: Controlling Smoke Inhalation Post-Puff
Written by: W. L. Dunn

Still in instrumentation phase.

Project Title: Puffing Behavior
Written by: F. J. Ryan

When 16 students smoked 85mm Marlboros or Salems cut to different lengths, we observed that (1) first puffs were strikingly similar in volume, flow and duration; whether taken on an 85, 78, 71, 65, or 59 mm rod; (2) second puffs were strikingly similar, too, whether at 78, 71, 65, 59, or 52 mm; (3) later-than-second puffs had volumes which were determined by rod length, rather than puff number. In this study puffs were taken at 60-second intervals. But smokers are normally free to take puffs at any time, so that it is inappropriate to use puff number alone to categorize volumes. A third puff taken when an 85 mm rod is 71mm long will have a different volume than a third puff taken when a rod is 40 mm long. Interpuff interval and static burn rate must be taken into account.

Some summarizing and grouping of the data in several recent studies suggests that puff volume is dependant on the

weight of the smoker. Our nine heaviest student smokers had considerably larger volumes per puff than our nine lighter smokers. Most of the volume increase is attributable to differences in flow rate, but there are differences in puff duration, too. Whether this is due to general strength and vigor, to generally greater appetite, to lung capacity, or to some other factor is unknown. If we take smoke [P. 2] volume per puff, body weight, and puff by puff tar and nicotine deliveries into account, finding mg tar (or nicotine) per puff per kg of body weight—then the group differences disappear.

This suggests some type of dose hypothesis in controlling smoke volume intake.

Project Title: Smoking, Arousal, and Mood Change
Written by: T. R. Schori

Data collection continues. We had hoped to be able to obtain good heart rate data using a cassette-type recording system. That now seems unlikely based upon the many difficulties we have experienced with that system. However, these data are only a nonessential minor part of this study.

Project Title: Miscellaneous
Written by: T. R. Schori

SEF is nearly ready to go out with an RP^3 test of our DL-2 cigarettes. One of the menthol cigarettes for MN-3 is being remade.

Project Title: Regression Analysis
Written by: T. R. Schori

Having done a number of studies (JXD-1, JND-2, TNT-3, TNT-4) in which we have systematically manipulated tar and nicotine parameters of cigarettes, we are trying to see if we can make any overall conclusion. Specifically, we are trying to predict nicotine/tar ratios for optimal cigarette acceptability at differing tar deliveries.

jh

[Plaintiff's Exhibit 98]

November 3, 1977

Dr. T. S. Osdene

W. L. Dunn

Proposed Study by Levy

I have given Carolyn approval to proceed with this study. If she is able to demonstrate, as she anticipates, no withdrawal effects of nicotine, we will want to pursue this avenue with some vigor. If, however, the results with nicotine are similar to those gotten with morphine and caffein, we will want to bury it. Accordingly, there are only two copies of this memo, the one attached and the original which I have.

/s/

WLD:jh

[Plaintiff's Exhibit 106]

PHILIP MORRIS U.S.A.

INTER-OFFICE CORRESPONDENCE

RICHMOND, VIRGINIA

To: Dr. R. B. Seligman Date: March 21, 1980

From: W. L. Dunn

Subject: The Nicotine Receptor Program

In responding to your query I'm going to first address the more inclusive topic of the psychopharmacology of nicotine. Abood's nicotine receptor program is included, as is the internal nicotine analogue program and the internal animal behavior program. All three of these efforts are aimed at understanding that specific action of nicotine which causes the smoker to repeatedly introduce nicotine into his body.

The psychopharmacology of nicotine is a highly vexatious topic. It is where the action is for those doing fundamental research on smoking, and from where most likely will come significant scientific developments profoundly influencing the industry. Yet it is where our attorneys least want us to be, for two reasons. It is important to have these two reasons expressed and distinguished from one another. The first reason is the oldest and is implicit in the legal strategy employed over the years in defending corporation within the industry from the claims of heirs and estates of deceased smokers: "We within the industry are ignorant of any relationship between smoking and disease. Within our laboratories no work is being conducted on biological systems." That posture has moderated considerably as our attorneys have come to acknowledge that the original carte blanche avoidance of all biological research is not required in order to plead ignorance about any pathological relationship between smoke and smoker. There is an important distinction that has

been made here which it is well to articulate: The acute, transient, short-lived effects of nicotine upon a physiological system (among which are those effects or that effect sought by the smoker) are wholly independent of those alleged, cumulative, long-term contributions of smoke compounds to disease processes.

We are now being allowed to conduct research on the immediate effects of nicotine because of this distinction. We can work with biological systems; we can inject nicotine in rats and we can perform the surgery required for implanting cannulae. But in doing so we are engaging in research on the pharmacological action of nicotine, which brings us to the second concern of our attorneys. This is a more recent concern arising from increasingly favorable prospects for the success of a legislative effort to transfer authority for the regulation of tobacco manufacture to a Federal agency (F.D.A.) known to have interests and powers antithetical to the interests of the industry. Any action on our part, such as research on the psychopharmacology of nicotine, which implicitly or explicitly treats nicotine as a drug could well be viewed as a tacit acknowledgment that nicotine is a drug. Such acknowledgement, contend our attorneys, would be untimely. Therefore, although permitted to continue the development of a three-pronged program to study the drug nicotine, we must not be visible about it.

[P.2] I have made these observations not to ridicule but rather to emphasize the vexatiousness of the topic. Everybody is vexed. The Don Hoels and the Ed Jacobs and our corporate attorneys see their mission to be to save the industry not only from litigative demise but also now from regulatory harassment. The Leo Aboods, the Gary Berntsons and the corporate research scientists see their mission to be to hold Philip Morris poised to respond to fast breaking opportunities or dangers on this very yeasty front.

Although our counselors have perhaps not been fully apprised of the relevance to the industry of the new developments in the neurosciences,[1] I am confident that were they so they would concur with us on the need to stay abreast of developments. And staying abreast requires a heavy commitment, a commitment best maintained by an active research program.

Our attorneys, however, will likely continue to insist upon a clandestine effort in order to keep nicotine the drug in low profile.[2]

Now I'm in a position to respond directly to your query about the Abood program. So long as we must be officially heedless of the drug properties of nicotine, and cannot openly communicate with our counterparts in other laboratories, and cannot aggressively institute a large-scale neurosciences program on site, then we must have a window to the outside world. Abood's laboratory is that window. Being himself on the forefront and knowledgeable of developments as they are occurring in other laboratories, he is our informant. We need him for that. And it is as simple as that. Whatever else falls out of the arrangement (a discovery in his lab!) will be a fringe benefit.

/s/ W.L. Dunn

jh
Attachment
cc: T. S. Osdene

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[1] Perhaps they should be apprised (see attached box)

[2] Could the rationale for such a position be reviewed with them?

[Plaintiff's Exhibit 109]

PHILIP MORRIS U.S.A.

INTER-OFFICE CORRESPONDENCE

RICHMOND, VIRGINIA

To: Dr. R. B. Seligman and Directors

From: T. S. Osdene

Subject: Evaluation of Major R&D Programs

Date: August 12, 1980

In my rather prejudiced opinion, I believe that the following programs are in order of highest priority. I have not included any of the Services areas and recognize that there are many projects and sub-projects which play a vitally important role in our increased effectiveness to the Corporation.

(1) New Product Development Including Brand Development

I believe that this is the life blood of the Corporation and must of necessity be the number one priority.

(2) Biological Effects of Smoke

In view of the clouds on the horizon, we must be more aware of the activities of additives, materials, etc.

(3) Flavor System Development for Low Delivery Cigarettes with Particular Emphasis on Reaction Flavors

I believe this is vital for our stance in the marketplace and will require contributions from Research as well as Development.

(4) Modification of Tobacco Substrate with Particular Emphasis on the Denitration Processes

Again, I feel this should yield the products of the future.

(5) Nicotine Program

This program includes both behavioral effects as well as chemical investigation. My reason for this high priority is that I believe the thing we sell most is nicotine.

(6) Improved Process Development

This would include leaf expansion, laser perforation, water-in-tobacco studies, etc., etc. [P.2]

I do recognize that this list is not clearly defined by directorates or by other organizational breakdowns, but I do feel that this is the order of importance that I attach to the various programs. I shall be happy to discuss.

TSO/mro /s/

cc: Dr. E. B. Sanders
Mr. W. F. Kuhn

[Plaintiff's Exhibit 110]

September 9, 1980

MEMORANDUM

TO: Mr. Kloepfer

FROM: Mr. Knopick

Attached please find the technical review of the conference which led to Victor Cohn's "surprise" story of 8/30 that the National Institute of Drug Abuse wants "addictive" added to the cigarette warning.

Also, the tiny item in the ADAMHA newsletter which brought on Cohn's story. I do not receive that publication.

I wonder if The Institute was caught unaware on this matter.

I have spoken previously with Pollin, current head of the National Institute on Drug Abuse. In July 1980, he sent me—and I made available throughout TI and reported in the NL—a monograph on "Cigarette Smoking as a Dependence Process." In its foreward, Pollin says: "Smoking is addictive."

Other hints: In NL 233, we quoted Pollin saying that cigarette smoking is the nation's leading drug problem among youths, despite the rise in marijuana use.

In NL 188, we quoted Pollin's predecessor, Dr. Robert DuPont: "Cigarette smoking is more addictive than using heroin, hooking two-thirds of the people who ever smoke."

Isn't the question two-fold?

Did TI miss a chance to attend and present information at NIDA's 1979 meeting which developed the "addictive" language?

Did TI see ADAMHA's newsletter and was it therefore better prepared to respond when this matter became public? [P. 2] I feel badly about my own lack of intelligence-gathering in this situation. But I don't think the questions I now raise are academic. Shook, Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as "free choice" if the person was "addicted."

[Plaintiff's Exhibit 122]

2/23/82

To: Dr. T. S. Osdene

From: J. L. Charles

Comments on "Future Strategies for the Changing Cigarette",
National Conference on Smoking & Health

On February 22, 1982 (the day of the 1982 Surgeon's General's press conference on Smoking and Health), you asked me to review the subject document and provide you with comments. The comments below are those of a concerned employee with a 20-year association with PM R&D, of which the past 10 years have been directly involved with smoking and health related research. I consider myself well trained in the biological and chemical sciences and qualified to make the following comments which should be taken as constructive criticism with suggestions [P. 2] as to how to approach the solution to some of the problems. You may shred this document, have it typed as is, incorporate the suggestions in a position paper for upper management or use the documents in any way you see fit.

This company is in trouble. The cigarette industry is in trouble. If we are to survive as a viable commercial enterprise we must act now to develop responses to smoking and health allegations from both the private and the government sectors. The anti-smoking forces are out to bury us and the techniques used to attack us do not always involve good science. Their goal is to destroy the industry and any means to that end is justified (in their opinion).

[P. 3] The Surgeon General's press conference was disturbing. For the first time associations between cancers other than the lung and cigarette smoking are being made in an emphatic manner. Associating cigarette smoking with 30% of all cancer deaths should make someone sit up and take notice. The issue of sidestream smoke and the potential influence on non-smokers was also addressed and even though the scientific basis for the statements were not sound nevertheless the damage is done.

The really important fact is that in a period of decreased governmental involvement and an economic recession the pressure is not deceasing. The problem will just not go away.

[P. 4] The "Future Strategies" document is even more disturbing than the Surgeon General's comment. Terms such as — standards setting, governmental or voluntary agency guidelines, qualitative analysis of tar, emphasis on brands with very low yields, disclosure of additives, regulation of future additives — are all worthy of concern. Again, this reflects a continuing pressure on the industry and requires a strategic response.

Let's face the facts:

1. Cigarette smoke is biologically active:

   A. Nicotine is a potent pharmacological agent. Every toxicologist, physiologist, medical doctor and most chemists know that. It's not a secret.

   B. Cigarette smoke condensate applied to the backs of mice causes tumors.

   C. Hydrogen cyanide is a potent inhibitor of cytochronum oxidase — a crucial [P. 5] enzyme in the energy metabolism of all cells.

D. Oxides of nitrogen are important in nitrosamine formation. Nitrosamines as a class are potent carcinogens.

E. Tobacco — specific nonvolatile nitrosamines are present in significant amounts in cigarette smoke.

F. Acrolein is a potent eye irritant and is very toxic to cells. Acrolein is in cigarette smoke.

G. Polonium-210 is present in cigarette smoke.

H. We know very little about the biological activity of sidestream smoke.

I. We do not know enough about the biological activity of additives which have been in use for a number of years.

[Plaintiff's Exhibit 135]

PHILIP MORRIS U. S. A.

INTER-OFFICE

CORRESPONDENCE

Richmond, Virginia

To: Mr. Jon Zoler **Date:** March 17, 1988

From: Myron Johnston

Subject: Smoking Among High School Seniors

I finally got enough storage space on the computer to mount the 1985 Public Health Service (PHS) public use tape. I compared the PHS data with data from the Survey Research Center (SRC) sample of graduating seniors and found that of all of the measures of smoking among high school seniors reported by the SRC, the best predictor appears to be the one you have chosen to use: smoked within the past 30 days. Attached is an updated copy of the table showing the various measures of smoking reported by the SRC.

Survey Research Center data as predictors of future smoking

That measure is not only the best predictor of future smoking, but it appears to predict almost exactly their ultimate smoking prevalence if we assume that the ultimate smoking prevalence is reached by ages 20 to 24. Since 1980 the percent of high school seniors who reported smoking within the 30 days prior to the survey has remained virtually unchanged at about 30 percent. By the time of the 1985 PHS survey most of those people were 20 to 24 years old, and the PHS data for 20–24 year-olds show smoking prevalence of people who have graduated from high school to be 30.0 percent.

The SRC data did, however, lead to an overestimate of the magnitude of the decline in smoking prevalence. The SRC surveys show a decline in the percent who smoked in the 30 days prior to the survey from about 38 percent in the 1970s to the current 30 percent. The PHS data on 20–24 year-old high school graduates, by contrast, show a much smaller decline, from 32.7 percent in 1979 to 30.0 percent in 1985. I think there are several possible explanations for the fact that the SRC data show a greater decline than the PHS data.

Reasons for overestimating the decline

I think the most important reason why the SRC data led to an overestimate of the magnitude of the decline in smoking among 20–24 year-olds is that there has been a delay in the onset of smoking. A subsample of each graduating class is followed after graduation. They are contacted one and one-half, three and one-half, five and one-half and seven and one-half years after graduation. In the case of the class of 1977, there was about a three percent increase in the percent who smoked daily between the time of high school [P. 2] graduation and the first re-contact one and one-half years later, after which the curve levels off. Subsequent classes have shown a much sharper increase in the percent who smoked daily during the first one and one-half years after graduation, and a slightly greater increase during the following two years, but, by the time they had been out of school for three and one-half years, they still had not reached the rates of those who graduated prior to 1980. Thus there has been an increase over time in the percent who began to smoke after graduation from high school.

The tendency to delay the onset of smoking is occurring in school as well. I examined the cumulative incidence of beginning smoking for the classes surveyed by the SRC. While the proportions of the classes of 1981 through 1985 who had begun to smoke by 12th grade are virtually identi-

cal, fewer members of each succeeding class started earlier than 12th grade. In addition, of those who had started by 12th grade, a larger proportion of the members of the class of 1985 than of the earlier classes were still smokers at the time of their graduation. Thus there has been less quitting while still in high school, which suggests to me that much of the decline was among the more casual smokers who were less committed to smoking in the first place. Thus the smaller decline in smoking prevalence of 20-24 year-olds than of high school seniors appears to be largely the result of a delay in taking up smoking coupled with lower rates of quitting.

Causes of the decline in smoking among high school seniors

The theory that I put forth in an earlier memo to explain the decline in smoking among high school seniors remains my best guess: That it was caused by the sharp increase in the price of gasoline. In comparing the cumulative smoking incidence of the high school senior males in the classes of 1976 and 1979, I found them to be about the same up to the age of 16, but after age 16 (the age at which many of them would have access to a car) the 1979 incidence was substantially below that of 1976. In 1967 it was possible to buy two gallons of gasoline and a pack of cigarettes for one dollar, and as recently as 1978, if incomes kept pace with inflation, the same purchasing power would still buy two gallons of gasoline and a pack of cigarettes.

By 1980 the same purchasing power would not even buy the two gallons of gasoline. When it comes to a choice between smoking cigarettes or cruising around in his car, the average red-blooded teenage American male would probably choose the latter. In that earlier memo I speculated that the stabilization of gasoline prices might result in an end to the decline in cigarette smoking among high school senior males. As it happens, the end of the decline in smoking prevalence did coincide with the stabilization of gasoline prices, and the

fact that smoking prevalence has been inching up since 1981 among whites lends some credence to the gasoline hypothesis. The gasoline hypothesis could also explain the increase in the proportion who begin to smoke after high school graduation: After high school graduation many young people go to work full time and thus have the money to buy both the gasoline and the cigarettes. [P. 3]

There are also certain behaviors that have roughly paralleled the trends in smoking among high school seniors. The percent who reported that they rode around in a car nearly every day declined with the decline in cigarette smoking from 1978 to 1981, as a result, no doubt, of the gasoline price increases. This could have been causally related to the decline in smoking, since teenagers for decades have been using their cars to engage in activities disapproved by their parents. Another thing that declined as smoking declined was getting together with friends informally. This may have been related to the gasoline shortage and price increase, and probably resulted in less contact with others who smoked and in fewer occasions for smoking.

Smoking is negatively related to active sports participation. During the period when smoking was declining among high school seniors, athletic participation was increasing, and the end of the decline in smoking prevalence coincided with a decline in athletic participation. There is probably a very real causal relationship here; since smoking is universally discouraged in high school athletic programs.

Dropouts

As we discussed, one shortcoming of the SRC data is that high school dropouts are, by definition, not surveyed. Dropouts account for about 12 percent of whites and 20 percent of blacks, and dropouts are much more likely to smoke than people who graduate from high school. The 1985 PHS data show that of the 20–24 year-old dropouts, 57.5 percent of the whites and 55.4 percent of the blacks smoke, while among

20–24 year-olds who graduated from high school, 30.6 percent of the whites and 27.9 percent of the blacks smoked. This means that the SRC data, relative to the PHS data for 20–24 year-olds, very accurately estimate ultimate smoking by whites but underestimate smoking by blacks at ages 20–24 by nearly six percentage points.

This seems reasonable in light of some other data I have. The National Longitudinal Survey of Children and Youth (NLS) asked, in 1984, the age at which the 12686 respondents (then aged 19 to 27) first tried a cigarette. This clearly is not the same as asking the age at which they first started smoking regularly, but blacks reported first trying a cigarette, on the average, two years later than whites (see chart attached). By age 21 black males have caught up with whites, but the proportion of black females having tried a cigarette never reaches the level of white females. I split the NLS sample of blacks into three age cohorts and found that this lag between blacks and whites appears to be increasing. Thus while most whites who smoke have started before age 21, blacks appear to continue to take up smoking well into their twenties.

Nonetheless, the much greater decline in smoking prevalence among blacks is real, and the SRC data did predict accurately the greater decline in the proportion of blacks who smoke. The PHS data show that among high school graduates ages 20 to 24, 32.7 percent of whites and 33.0 percent of blacks smoked in 1979, with declines by 1985 to 30.6 and 27.9 percent respectively. This has serious implications for the menthol market, since 90 percent of black smokers under the age of 30 smoke a menthol. The only brands of ours that would suffer from a decline in smoking among young blacks are the menthol versions of B&H and Virginia Slims, since B&H, in particular, has a good following among young black females. [P. 4]

Other comparisons of Survey Research Center and Public Health Service data

The SRC data come very close to predicting the percent of female high school graduates aged 20 to 24 who smoke (30.7 percent), but underestimate the percent of male smokers (29.4 percent). The reason for this, based the SRC recontacts of the people they first surveyed as high school seniors, is that it is the males, in particular, who are delaying the onset of smoking. Thus, while a smaller proportion of them smoke as high school seniors, by age 21 the proportion who smoke has not declined as dramatically as the proportion who smoked in high school. It seems reasonable that the car and athletic participation effects mentioned above would have a greater effect on males than on females in depressing smoking prevalence in high school.

At first glance the SRC data appear to result in an slight underestimate of smoking among 20-24 year-olds who did not go to college (41.1 percent in 1985), and an overestimate of smoking prevalence among those who did (17.9 percent). This is not necessarily the case, however, for the question regarding college plans referred specifically to four years of college, and, in any case, it is quite possible that the plans of some failed to materialize. Regionally, the SRC data lead to an overestimate of the percent of 20-24 years who will smoke in the Northeast (30.7) and the Midwest (30.4) and an underestimate in the South (30.5) and West (28.2).

Overall, I am quite pleased with the close correspondence between the data from the SRC and the PHS. Clearly the correspondence is closest in the groups with the larger sample sizes — the total, whites, males and females — and poorest where the sample sizes are smaller — blacks and the individual regions. Now that I have had a chance to look at the PHS data and compare the two data sources I am even more confidant than before that we can use the data on high

school seniors to predict trends in smoking among young adults.

MEO:f

/s/

cc: Ed Gee
Ken Houghton
Carolyn Levy
Jim Myracle
Jack Nelson
John Tindall
Larry Wexler
Central File

[page 5]

SMOKED IN PAST 30 DAYS

		Sex		Race		Census Regions				College Plans	
	Total	Male	Female	White	Black	NE	NC	South	West	Yes	No
1975	37.8	37.4	38.9	Na	na	41.2	39.6	36.2	36.3	na	na
1976	38.8	37.7	39.1	38.3	39.7	41.8	41.3	39.1	28.3	39.8	46.4
1977	38.5	36.7	39.7	38.4	38.4	43.0	40.8	37.8	37.8	38.6	46.4
1978	36.7	34.5	38.1	37.0	31.5	40.9	39.0	35.7	27.4	37.4	44.6
1979	34.4	31.2	37.1	34.9	28.7	37.0	36.0	35.4	24.8	36.0	43.1
1980	30.5	26.8	33.4	31.0	25.2	34.1	31.9	31.9	21.1	32.3	39.6
1981	29.4	26.5	31.5	30.1	22.3	31.5	32.3	28.9	21.8	27.9	38.1
1982	30.0	26.8	32.6	31.3	21.2	37.1	34.5	29.4	20.4	32.1	38.2
1983	30.3	28.0	31.6	32.3	21.2	34.6	33.2	28.7	21.8	23.3	38.0
1984	29.3	25.9	31.9	31.0	17.6	33.8	31.4	28.6	22.9	25.7	37.9
1985	30.1	28.2	31.4	31.7	18.7	34.2	34.1	25.6	26.3	22.8	40.5
1986	29.6	27.9	30.6	32.0	14.6	35.2	32.5	26.1	23.3	24.0	38.5

SMOKED ONE OR MORE PER DAY IN PAST 30 DAYS

		Sex		Race		Census Regions				College Plans	
	Total	Male	Female	White	Black	NE	NC	South	West	Yes	No
1975	27.0	27.1	26.9	Na	na	31.5	28.7	26.2	17.3	na	na
1976	28.6	28.0	28.8	28.8	26.7	32.2	30.2	29.1	19.4	29.7	36.2
1977	29.0	27.9	30.1	29.0	23.7	33.8	29.6	28.9	19.2	29.5	37.4
1978	27.5	26.0	28.2	27.7	22.1	32.6	28.6	26.4	19.1	28.3	35.1
1979	25.3	22.8	27.8	25.9	19.4	28.6	26.9	25.8	16.9	27.0	33.9
1980	21.3	18.6	23.4	21.8	15.9	24.2	22.0	22.7	13.9	13.8	29.9
1981	20.2	18.1	21.8	20.9	13.6	23.3	22.9	18.9	13.1	12.8	29.4
1982	21.1	18.8	23.2	22.4	12.4	23.3	24.0	20.4	12.7	13.2	29.5
1983	21.1	19.1	22.2	22.0	12.6	26.1	23.4	19.4	13.0	13.8	29.4
1984	18.7	16.1	20.5	20.0	9.0	23.6	20.3	17.7	12.4	11.9	27.2
1985	19.4	17.9	20.6	20.7	10.8	24.9	22.4	15.9	14.2	12.5	29.8
1986	18.7	16.9	19.8	20.4	7.8	24.9	19.9	15.8	13.4	12.7	28.2

BEST AVAILABLE COPY

[page 6

SMOKED HALF A PACK OR MORE PER DAY IN PAST 30 DAYS

		Sex		Race		Census Regions				College Plans	
	Total	Male	Female	White	Black	NE	NC	South	West	Yes	No
1975	18.0	19.8	16.1	na	na	22.2	19.0	16.9	17.3	na	na
1976	19.1	19.9	18.0	20.1	11.7	22.4	20.2	19.0	12.4	11.8	25.5
1977	19.6	19.9	19.0	20.6	10.2	24.2	20.8	18.7	11.5	11.4	27.2
1978	18.7	19.0	18.0	19.7	9.5	23.7	19.8	17.0	12.2	11.1	25.4
1979	16.4	15.4	17.1	17.3	8.4	19.7	17.4	16.1	10.7	9.7	23.3
1980	14.3	13.5	14.7	15.1	6.1	17.0	15.4	14.6	8.3	8.2	21.3
1981	13.5	12.8	13.8	14.6	5.6	16.6	16.0	11.8	7.2	7.5	20.8
1982	14.2	13.1	14.7	15.6	8.2	15.5	17.3	13.3	7.1	7.8	21.0
1983	13.7	13.0	13.7	14.9	4.6	16.6	17.1	12.4	6.4	7.6	20.9
1984	12.3	11.1	12.9	13.5	3.7	17.4	12.9	11.3	7.4	6.5	19.6
1985	12.4	12.4	12.	13.6	4.1	17.0	14.9	9.6	7.6	6.6	20.9
1986	11.3	10.6	11.6	12.7	2.9	15.6	12.4	10.0	6.5	6.4	19.1

SMOKED A PACK OR MORE PER DAY IN PAST 30 DAYS

		Sex		Race		Census Regions				College Plans	
	Total	Male	Female	White	Black	NE	NC	South	West	Yes	No
1975	9.7	11.7	7.9	na	na	12.8	10.5	8.8	4.9	na	na
1976	9.8	10.8	8.8	10.7	2.7	11.5	10.8	9.8	5.9	5.3	13.8
1977	10.4	11.4	9.3	11.4	2.6	12.7	11.2	10.2	5.4	5.7	15.0
1978	9.7	10.9	8.5	10.6	2.4	12.9	10.3	8.3	6.5	5.3	13.8
1979	8.4	8.2	8.5	9.1	2.3	10.4	9.0	8.4	5.0	4.4	12.7
1980	7.4	7.7	6.9	8.1	1.8	8.9	8.4	7.5	3.5	3.9	11.5
1981	7.1	7.0	7.0	8.0	1.7	9.3	8.8	5.6	3.2	3.6	11.8
1982	7.4	7.3	7.1	8.5	1.1	7.9	9.8	6.7	2.9	3.8	11.2
1983	7.3	7.3	7.0	8.3	1.2	8.3	9.7	7.0	2.7	3.8	11.3
1984	6.6	6.6	6.2	7.4	0.8	9.5	7.0	6.1	3.5	3.1	11.1
1985	6.6	7.0	6.2	7.5	1.0	9.2	8.3	5.1	3.3	3.3	11.4
1986	5.9	5.8	5.8	6.8	0.8	7.8	6.7	5.4	3.1	2.9	10.8

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CURRENT REGULAR OR OCCASIONAL SMOKERS

		Sex		Race		Census Regions				College Plans	
	Total	Male	Female	White	Black	NE	NC	South	West	Yes	No
1975	38.4	38.8	37.6	na	na	40.5	41.5	38.1	28.6	na	na
1976	40.4	38.9	41.4	40.9	37.1	41.5	44.1	39.4	31.9	32.9	46.8
1977	40.2	38.4	41.6	40.5	34.9	44.5	42.8	39.0	30.2	32.1	47.1
1978	39.0	36.3	41.2	39.8	31.7	42.2	41.0	38.9	29.6	31.0	46.0
1979	36.8	33.2	39.6	37.2	28.5	38.7	39.4	37.5	27.6	29.4	44.2
1980	32.9	29.3	35.7	33.6	25.2	35.5	34.6	33.9	24.0	25.9	40.9
1981	32.5	28.7	35.7	33.8	23.2	33.9	36.0	31.6	25.0	26.2	40.3
1982	32.7	28.8	36.2	34.2	22.7	34.4	36.4	32.1	23.8	26.1	40.1
1983	33.1	29.7	36.0	34.5	23.4	37.6	37.2	31.2	24.1	27.0	40.2
1984	32.1	27.8	35.5	34.1	19.6	35.4	34.6	31.0	26.3	26.4	39.4
1985	32.4	29.7	34.5	34.7	19.1	36.3	36.8	27.5	29.1	26.8	41.1
1986	31.8	29.8	33.5	34.5	16.0	35.9	34.6	29.1	26.8	27.4	39.8

CURRENT REGULAR SMOKERS

		Sex		Race		Census Regions				College Plans	
	Total	Male	Female	White	Black	NE	NC	South	West	Yes	No
1975	22.0	22.2	21.8	na	na	26.8	23.1	21.1	13.7	na	na
1976	23.5	22.5	24.1	23.9	20.7	26.3	25.2	23.6	15.4	16.9	30.4
1977	23.9	22.1	25.2	24.3	17.7	28.8	24.2	23.3	15.1	15.4	31.5
1978	22.8	21.1	24.0	23.5	16.3	28.0	24.3	20.9	15.2	14.4	30.2
1979	20.3	17.4	22.5	20.9	13.5	23.5	22.0	20.0	12.9	13.1	27.5
1980	17.4	15.0	19.2	18.1	11.0	20.1	18.5	17.8	10.7	10.9	24.6
1981	16.4	14.4	17.7	17.3	9.0	19.2	19.0	15.0	9.7	10.0	24.1
1982	17.0	14.4	19.0	18.2	9.2	18.9	20.1	16.0	9.3	10.2	24.8
1983	17.0	14.8	18.3	17.8	8.4	21.1	19.8	15.0	9.7	10.7	24.2
1984	15.1	12.7	16.7	16.4	6.6	19.5	16.7	13.9	9.5	9.2	22.5
1985	15.8	14.0	16.5	16.5	7.5	20.3	18.1	12.3	10.9	9.2	24.5
1986	14.5	12.6	16.0	16.0	5.1	19.8	15.4	12.4	9.7	9.4	22.6

[page 8]

EVER SMOKED CIGARETTES

		Sex		Race			Census Regions			College Plans	
	Total	Male	Female	White	Black	NS	NE	South	West	Yes	No
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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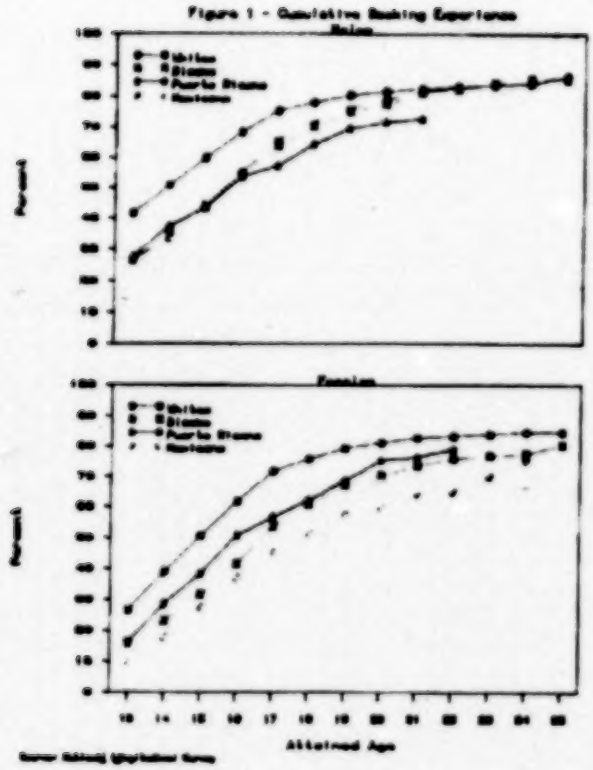


[Plaintiff's Exhibit 144]

PHILIP MORRIS USA

INTEROFFICE CORRESPONDENCE

120 PARK AVENUE, NEW YORK, NEW YORK 10017

TO: William I. Campbell DATE: 10/2/92

FROM: Carolyn Levy

SUBJECT: Smoking Cessation Technology

I agree that the market appeal and profit margins of nicotine patches will heighten the already active efforts by drug companies to develop smoking cessation technologies. PM USA's R&D department has been following this area worldwide for many years by monitoring patents, scientific publications, presentations at scientific meetings and news releases, as well as by having discussions with colleagues in the academic community. We have the expertise in-house to interpret findings from these various sources and predict the potential implications for our business.

In the past, smoking cessation efforts generally have taken four different approaches: nicotine substitution, blockage of nicotine receptor sites, alleviation of "withdrawal" symptoms and smoking deterrence using, for example, drugs to change the taste of smoke. Today, nicotine substitution (through skin patches, nasal sprays or inhalers), usually coupled with some kind of behavioral therapy, seems to be the avenue that most drug companies are pursuing.

Available data suggest that nicotine gum/patches are only minimally effective in helping smokers quit unless combined with behavioral therapy. Despite this, there are reports that many doctors are prescribing patches alone, suggesting that

their maximum effectiveness will not be realized. Many people feel that because of the need for behavioral intervention as a component of smoking cessation, which is both costly and time consuming, it is unlikely that a truly effective, readily available "habit breaker" will be developed.

Potentially more effective forms of nicotine substitution are nicotine nasal sprays and inhalers, since their patterns of nicotine absorption more closely resemble cigarette smoking. The Lancet reported that this property suggests that they may have more "dependence potential" so that some smokers will merely substitute sprays/inhalers for cigarettes.

The medical community's reaction to this type of substitution is difficult to predict. However, there are indications that in the U.K. it may be viewed as the lesser of two evils. For example, an editorial in The Lancet in May, 1991, stated, "There is no good reason why a switch from tobacco products to less harmful nicotine delivery systems should not be encouraged." And as reported in the N.Y. Times last month, Dr. Godfrey Fowler, a smoking cessation specialist at Oxford University said, "It's certainly safer to get nicotine clean from a spray than dirty from tobacco." [P. 2]

There is a growing body of research demonstrating nicotine's positive influences on information processing and memory in addition to animal studies which suggest that nicotine may benefit Alzheimer's patients. These findings, combined with the lack of evidence that nicotine is harmful in doses achieved through smoking, suggest that nicotine substitution technologies may have wider marketplace applicability than solely as smoking cessation aids.

It is interesting to note that the factors which are affecting our business today are quite similar to those that preceded the transition from chewing tobacco to cigarette smoking. In the late 1800's there were health concerns related to the spread of tuberculosis through spitting and the social acceptability of chewing declined as the U.S. population became more urban.

This suggests that at the very least we should have contingency plans for a change in the predominant form of nicotine usage. If the market were to broadly redefine our business as "the delivery of nicotine in an aerosol", the development of alternative delivery mechanisms, substrates, flavors, etc. would make sense. We currently have R&D projects underway to pursue some of these goals, as well as a task force that has been given the responsibility of putting together a business plan for one product which is nearing final prototype development.

Regarding the news of research on a pill to block the craving for cocaine, Dr. Chris Fibiger, the medical researcher referenced in the report, currently is not working on nicotine. In the future we believe he intends to see if the neural circuits for cocaine craving also mediate the desire for other substances, including nicotine. If these circuits do mediate nicotine intake and they could be blocked, then it is possible that cigarettes' appeal would decline.

We have detailed information available on all of the topics I have touched upon. Please let me know if you would like to have a more in-depth discussion.

CL/gt
/s/ Carolyn

cc: John R. Nelson

[Plaintiff's Exhibit 148]

Study Finds Promise in Regimen for Treatment of Bone Disease

2 States Limit Dairies' Use Of Hormone

SMOKERS AND NON-SMOKERS

FACTS YOU SHOULD KNOW

Fact:

Fact:

Fact:

Fact:

Fact:

Philip Morris USA

SMOKERS AND NON-SMOKERS:

FACTS YOU SHOULD KNOW

Both smokers and non-smokers deserve to know facts, not innuendo, about cigarettes. Yesterday, Philip Morris and other U.S. tobacco manufacturers helped to set the record straight by speaking before a Congressional committee. For your consideration, here are the highlights of the information presented by Philip Morris in that session:

Fact:

Philip Morris does not add nicotine to its cigarettes. The nicotine delivery of all commercial cigarettes is measured and disclosed to one tenth of a milligram, both in public releases by the Federal Trade Commission, and in very advertisement for the last 25 years. In the end, Philip Morris lowers the amount of nicotine naturally occurring in tobacco by between 50% in the case of a Marlboro, and 90% in an ultra-low brand.

Fact:

Philip Morris does not "manipulate" nicotine levels. We voluntarily opened our manufacturing operations to the Food and Drug Administration, in a good faith effort to resolve the allegations that we add nicotine or control its level in our cigarettes.

Our manufacturing process includes over 400 quality control checkpoints and only two of them measure nicotine. In every case, and with every brand we manufacture, the nicotine level in the finished cigarette is lower than the nicotine level of the original, natural tobacco leaf.

Fact:

Philip Morris has not used patented processes to increase or maintain nicotine levels. Philip Morris, like every other corporation, applies for, and obtains patents on virtually every innovation we pioneer. Philip Morris currently holds

over 600 patents. They are publicly disclosed upon issuance through the U.S. Patent Office. Philip Morris has never used any of these patents to increase, or even maintain, nicotine levels in any of its products. In fact, the only nicotine related patents Philip Morris has ever used are for the reduction of nicotine.

Fact:

Philip Morris does not believe cigarette smoking is additive. People can and do quit smoking all the time. According to the 1988 Surgeon General's Report, there are more than 40 million former smokers in the United States and 90% quit on their own, without any outside help.

Fact:

None of the ingredients added in the manufacture of cigarettes is harmful as used. Cigarette ingredients have been scrutinized by the Department of Health and Human Services since 1986. In addition, an independent safety assessment was conducted by six renowned scientists. Their report concluded: "The ingredients added to tobacco in the manufacturer of cigarettes by the six major U.S. manufacturers are not hazardous under conditions of use."

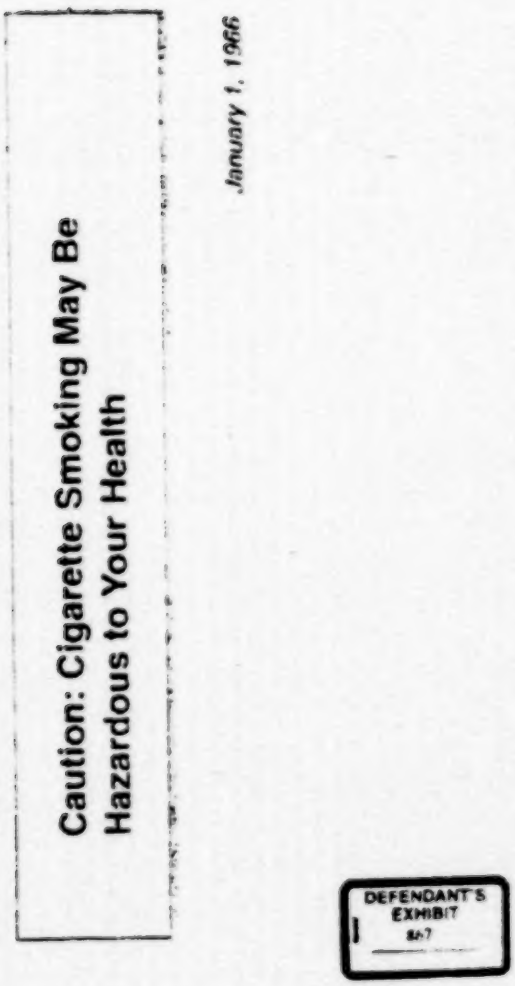
In closing, we'd like to offer one more fact about how the majority of Americans feel about smoking bans. According to a recent CNN/USA Today poll, the majority of non-smokers, as well as smokers, are opposed to outright smoking bans. In fact, almost 7 out of 10 Americans favor designated smoking areas. Obviously, non-smokers feel that smokers have rights, too.

For a full transcript of the information presented by Philip Morris, the ingredients list, or further information, please call 1-800-852-8749.

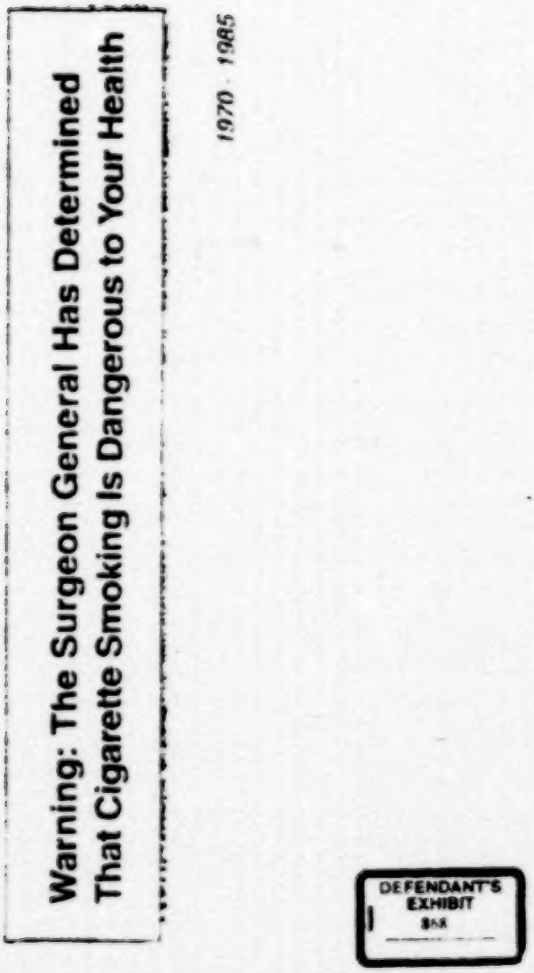
Philip Morris USA

DEFENDANT'S EXCERPTS OF RELEVANT TRIAL EXHIBITS IN THE CIRCUIT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH

[Defendant's Exhibit 867]



[Defendant's Exhibit 868]



[Defendant's Exhibit 869]

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 34

IN THE CIRCUIT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH

PUNITIVE DAMAGES — PRODUCTS LIABILITY

I will now instruct you on punitive damages. If you find that Marlboro cigarettes are a defective product or that the defendant is guilty of negligence or fraud, you must consider whether to award punitive damages.

Punitive damages may be imposed only if the plaintiff has satisfied you by clear and convincing evidence that the defendant, in engaging in the conduct that caused Jesse Williams' death, has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.

Clear and convincing evidence is evidence of such weight and quality that, even when considered in light of any conflicting evidence, leaves you with a firm conviction that the truth of the matter in question is highly probable.

You have the discretion to award, or not to award, punitive damages. In the exercise of that discretion, you may consider whether the imposition of punitive damages is necessary to punish and deter similar misconduct by defendant and others in the future.

[P. 2] In considering punitive damages, I remind you that the sale of cigarettes has in itself been at all times a lawful activity in this State. You are not to punish the defendant on account of the propensity of cigarettes to cause illness and death for some of those who smoke them, or the defendant's knowledge of that propensity, except to the extent that the risks from smoking were not a matter of general public

knowledge but were known to and unlawfully misrepresented by the defendant.

In determining whether the defendant's conduct is such as to subject it to punitive damages, you must not allow your decision to be influenced by the defendant's financial condition, corporate status, or place of business.

If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set an amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is no set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection.

(1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring [P. 3] lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

[ALTERNATIVE]

(1) You are not to punish the defendant for the impact of its conduct on individuals in other states.

(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct — that is, how far the defendant has departed from accepted societal norms of conduct.

Factors that you may find to bear upon the degree of reprehensibility include:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct, beyond the harms generally understood to inhere in cigarette smoking;

(b) The degree of the defendants awareness of that likelihood;

(c) The degree to which the defendant was motivated by a desire to obtain illicit profits from its misconduct;

(d) The duration of the misconduct and any concealment of it;

(3) In determining how much punishment is necessary to achieve the goal of appropriate deterrence, you may consider the extent to which the obligation to pay compensatory damages will suffice to cause defendant and others to refrain from similar misconduct in the future.

(4) Finally, you may also consider the defendant's financial condition as part of the process of arriving at an appropriate punishment. However, you may not punish the defendant simply because it is large. Rather, the paramount consideration remains the degree of reprehensibility of any misconduct and the extent of any harm caused by such misconduct.

[Excerpts of Jury Instructions]

IN THE CIRCUIT COURT OF
THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

The Estate of JESSE D. WILLIAMS, Deceased,
by and through MAYOLA WILLIAMS,
Personal Representative,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED,

Defendant.

Volume 25

Circuit Court
No. 9705-03957

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, That the above-entitled matter came on regularly for Jury Trial and was heard before the Honorable Anna J. Brown, Judge of Department No. 7C, of the Circuit Court of the County of Multnomah, State of Oregon, commencing at 8:30 a.m., Friday, March 26, 1999.

* * *

Reported by Jennifer L. Wiles, CSR, RPR.

* * *

[Tr. 49] thrift, and the age, health, and life expectancy of the Decendent's spouse and children.

The amount of non-economic damages in the case may not exceed the sum of $1 million dollars. And that sum should be considered by you only in that it sets an upper limit.

It's my duty to tell you what the upper limit is, but it's not my intention that you should take from the fact that I'm instructing you on damages any implication about how you should decide this case.

Now, on the question of punitive damages, if the plaintiff, the Estate of Jesse Williams, prevails on either the claim of negligence or the claim of misrepresentation or both, then you must consider whether to assess punitive damages against the defendant Philip Morris.

In order for you to award punitive damages against the defendant, plaintiff must show by clear and convincing evidence that the defendant, in engaging in the conduct which was a cause of damage to the plaintiff, showed a reckless and outrageous indifference to a highly unreasonable risk of harm and acted with a conscious indifference to the health, safety and [Tr. 50] welfare of others.

Clear and convincing evidence is evidence that makes you believe that the truth of the claim is highly probable.

If you decide that the defendant has acted as claimed by the plaintiff, then you have the sole discretion to award or not award punitive damages.

Punitive damages are awarded against a defendant to punish misconduct and to deter misconduct by defendant and others similarly situated.

Punitive damages are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct.

The amount of punitive damages, if any, shall be determined and assessed based upon the following factors: First, the likelihood at the time that serious harm would arise in this state from the defendant's misconduct; second, the degree of the defendant's awareness of that likelihood, third, the profitability of the defendant's misconduct in this state;

fourth, the duration of the misconduct and any concealment of it; fifth, the attitude and the conduct of the [Tr. 51] defendant upon discovery of the misconduct; and fourth, the financial condition of the defendant.

The amount of punitive damages you assess may not exceed the sum of the $100 million dollars.

Now, I would like to go through one more time the verdict forms to be sure my explanations have been complete.

First, you have two separate claims, each of which must be considered independently and each of which must stand alone in terms of a separate verdict.

Remember that, in order to return a verdict, at least nine of you must agree on all components of the verdict for each claim on each verdict form.

And, in theory, a different set of nine of you could return a verdict on one claim than agreed on the verdict for another claim.

Everybody clear on that part? All right.

Starting with the negligence claim, Question 1 I have already reviewed. When nine of you agree on an answer, the presiding juror fills it in.

If your answer to Question 1 is no, then your verdict is for the defendant on the

* * *

[Jury Verdict]

IN THE CIRCUIT COURT OF
THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

The Estate of JESSE D. WILLIAMS, Deceased,
by and through MAYOLA WILLIAMS,
Personal Representative,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED,

Defendant.

Volume 26

Circuit Court -
No. 9705-03957

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, That the above-entitled matter came on regularly for Jury Trial and was heard before the Honorable Anna J. Brown, Judge of Department No. 7C, of the Circuit Court of the County of Multnomah, State of Oregon, commencing at 12:05 p.m., Tuesday, March 30, 1999.

* * *

Reported by Jennifer L. Wiles, CSR, RPR.

* * *

[Tr. 10] please.

THE COURT: Are we ready for the jury?

COUNSEL: Yes, Your Honor.

THE COURT: Bring them in, please.

Good afternoon, jurors.

JURORS: Good afternoon.

THE COURT: Mr. Argetsinger, you are the presiding juror?

JUROR ARGETSINGER: Yes.

THE COURT: Has the jury reached a verdict?

JUROR ARTGETSINGER: We have, Your Honor.

THE COURT: Would you hand the verdict forms, please, to Mr. Rice? Thank you.

These are verdicts in favor of the Plaintiff on both the negligence and the misrepresentation claims.

On the negligence verdict form, in answer to Question 1, "Was the Defendant negligent," the jury answered yes.

In answer to Question 2, "Was Jesse Williams also negligent," the jury has answered yes.

In answer to Question 3, the jury has allocated 50 percent negligence to each of the [Tr. 11] parties.

In answer to Question 4, compensatory damages, the jury has awarded the agreed economic damages of $21,485.80 and awarded non-economic damages of $800,000.

In answer to Question 5, "Should punitive damages be awarded," the jury has answered no.

And dated, this form, the 30thday of March.

On the misrepresentation verdict form, the jury has answered yes to Question 1.

In answer to the compensatory damages question, the same damages are entered $21,485, economic damages, $21,485.80, economic damages; and non-economic damages of $800,000.

In answer to Question 3, "Should punitive damages be awarded," the jury has answered yes.

And in answer to Question 4, "What is the amount of punitive damages," the jury has answered $79,500,000.

The form is dated the 30th of March.

Mr. Argetsinger, did at least the same nine jurors agree to each of the verdict forms?

THE WITNESS: We did, Your Honor.

THE COURT: Are there any inquiries [Tr. 12] before the verdicts are received and the jury discharged for the Plaintiffs?

MR. GAYLORD: None, Your Honor.

THE COURT: For the defense?

MR. DUMAS: Yes, Your Honor. We would request that the jury be polled individually, claim by claim.

THE COURT: I didn't hear the last.

MR. DUMAS: Individually polled, Your Honor, by question.

THE COURT: By verdict form and question?

MR. DUMAS: Yes. Yes.

THE COURT: All right.

A poll has been requested, jurors, and the poll asks that I confirm that at least the same nine jurors have agreed. And we need to do this question by question, juror by juror.

I think it's easiest if you just follow along with me with your notes on the verdict forms.

I'm going to read the question, and then your name is going to be called. And you tell me how you answered the question. If you answered, for example, yes to Question 1, say yes. If you answered no to Question 1, say no.

* * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

The Estate of JESSE D. WILLIAMS, by and through MAYOLA WILLIAMS his Personal Representative

Plaintiff,

v.

PHILIP MORRIS INCORPORATED,

Defendant.

Case No. 9705-03957

JUDGMENT

This action came on for trial on February 22 through March 30, 1999 before the Honorable Anna J. Brown. During trial the plaintiff withdrew her claim for strict product liability. During trial Fred Meyer, Inc. was dismissed as a defendant. Plaintiff's remaining claims for negligence and misrepresentation were submitted to the jury. The jury rendered its verdicts as follows:

NEGLIGENCE

"We the jury find:

1. Was the defendant negligent as claimed in plaintiff's [P. 2] complaint, and if so, was such negligence a cause of plaintiff's damages, as to cigarettes sold to Jesse Williams on or after September 1, 1988?

ANSWER: Yes: X

No: _____

If your answer to question 1 is "yes," then you should proceed to question 2.

If your answer to question 1 is "no," do not answer any further questions on this verdict form. The presiding juror should sign this verdict form.

2. Was Jesse Williams negligent as claimed in defendant's answer, and if so, was such negligence a cause of plaintiff's damages?

ANSWER: Yes: X

No: _____

If your answer to question 2 "yes" [*sic*], proceed to question 3. If your answer to 2 is "no," proceed to question 4.

3. What is the percentage of each of the parties' negligence which caused damage to plaintiff?

ANSWER: Defendant: 50 %

Jesse Williams: 50 %

(The percentages must total 100%.)

If Jesse Williams' negligence was more than 50%, your verdict is for the defendant. Do not answer any more questions on this verdict form. The presiding juror should sign this verdict form. Otherwise, proceed to question 4. [P. 3]

COMPENSATORY DAMAGES

4. What are the plaintiff's damages?

ANSWER: Economic Damages: $ 21,485.80

Non-economic Damages: $ 800,000.00

Do not reduce the damages by Jesse Williams' percentage of fault, if any, because the Court will do that when it enters judgment. Proceed to question 5.

PUNITIVE DAMAGES

5. Should punitive damages be awarded against defendant?

ANSWER: Yes: _____

No: X

If your answer to question 5 is "yes," proceed to question 6.

If your answer to question 5 is "no," do not answer any further questions on this verdict form. The presiding juror should sign this verdict form.

6. What is the amount of punitive damages you award against defendant?

ANSWER: $_____

DATED this 30th day of March, 1999.

/S/ Ernest Argetsinger
Presiding Juror"

MISREPRESENTATION

"We the jury find:

1. Did defendant make false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied, and if so, were such false representations and reliance a cause of [P. 4] damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988?

ANSWER: Yes: X

No: _____

If your answer to question 1 is "yes," then you should proceed to question 2.

If your answer to question 1 is "no," do not answer any further questions on this verdict form. The presiding juror should sign this verdict form.

COMPENSATORY DAMAGES

2. What are the plaintiff's damages?

ANSWER: Economic Damages: $ 21,485.80

Non-economic Damages: $ 800,000.00

PUNITIVE DAMAGES

3. Should punitive damages be awarded against defendant?

ANSWER: Yes: X

No: _____

If your answer to question 3 is "yes," proceed to question 4.

If your answer to question 3 is "no," do not answer any further questions on this verdict form. You [*sic*] juror presiding should sign this verdict form.

4. What is the amount of punitive damages you award against defendant?

ANSWER: $ 79,500,000.00

DATED this 30th day of March, 1999.

/S/ Ernest Agetsinger
Presiding Juror" [P. 5]

The court received the verdict. In light of the jury's conclusion that decedent was 50% at fault, the verdict on the negligence claim is reduced to $10,742.90 in economic damages and $400,000.00 in noneconomic damages. On the mis-

representation claim the jury's verdict for noneconomic damages is reduced to $500,000.00 by application of ORS 18.560.

Following the verdict defendant filed a Motion for Reduction of Punitive Damages Award. After a hearing, the court reduced the punitive damages award to $32,000,000.00.

Defendant has objected to plaintiff's form of judgment. Defendant claims that the Master Settlement Agreement provides for a release (or, in the alternative, an offset) of the State of Oregon's portion of the punitive damages verdict and judgment in this case.

The Court has decided to enter judgment without adjudicating the merits of defendant's claim of release. The Court orders that the claim of release will be adjudicated in a later action. The State and the parties agree that the claim of release has been properly raised and preserved. The State and the parties further agree that adjudicating the claim of release in a later action, and not before the entry of judgment in this case, will in no way affect the rights of the State and defendant to fully adjudicate that claim and to obtain whatever relief is proper.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that plaintiff's claim for strict product liability is dismissed. [P. 6]

IT IS FURTHER ORDERED AND ADJUDGED that Fred Meyer, Inc. is dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that the judgment for compensatory damages shall not exceed the greater amount of the award on plaintiff's claim for negligence or plaintiff's claim for misrepresentation, plus interest, costs and disbursements as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff shall have judgment against defendant in the amount of $521,485.80 for compensatory damages, plus interest,

costs and disbursements as provided by law, and plaintiff and the State of Oregon shall have judgment against the defendant for $32,000,000.00 for punitive damages, plus interest as provided by law.[1] [P. 7]

MONEY JUDGMENT

Judgment Creditors:	The Estate of Jesse D. Williams by and through Mayola Williams State of Oregon, Criminal Injuries Compensation Account of the Department of Justice Crime Victims Assistance Section, for that portion of the punitive damages award to which the State is entitled pursuant to ORS 18.540(1)(b), which provides that "[s]ixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section[.]"
Attorney for Judgment Creditor	Raymond F. Thomas

[1]Plaintiff disputes the State's right and interest in any of the damages.

The Estate of Jesse D. Williams by and through Mayola Williams:	Swanson, Thomas & Coon William A. Gaylord Gaylord & Eyerman
Attorney for Judgment Creditor State of Oregon:	Hardy Myers Attorney General
Judgment Debtor:	Philip Morris Incorporated

NON-ECONOMIC DAMAGES IN FAVOR OF THE ESTATE OF JESSE D. WILLIAMS	$500,000.00
ECONOMIC DAMAGES IN FAVOR OF THE ESTATE OF JESSE D. WILLIAMS	$21,485.80
PUNITIVE DAMAGES IN FAVOR OF THE ESTATE OF JESSE D. WILLIAMS and STATE OF OREGON, for that portion of the punitive damages award to which the State is entitled pursuant to ORS 18.540(1)(b), which provides that "[s]ixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section":	$32,000,000.00

[P. 8]

POST-JUDGMENT INTEREST:

Principal Amount of Money Judgment:	$32,521,485.80
Interest Start Date:	May 13, 1999
Interest Rate:	9%
Interest Type:	Simple

COSTS and DISBURSEMENTS: As provided by law and pursuant to ORCP 68.

DATED this 20th day of May, 1999.

Hon. Anna J. Brown
Circuit Court Judge

Submitted by:

Maureen Leonard
921 SW Washington, Suite 764
Portland, Oregon 97205
Telephone: (503) 224-0212

James S. Coon
Swanson, Thomas & Coon
621 SW Morrison, Suite 900
Portland, Oregon 97205
Telephone: (503) 228-5222

Of Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF JESSE D. WILLIAMS, by and through MAYOLA WILLIAMS, Personal Representative,
Plaintiff,

v.

PHILIP MORRIS INCORPORATED,
Defendant.

No. 9705 03957

DEFENDANT PHILIP MORRIS INCORPORATED'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR REDUCTION OF PUNITIVE DAMAGES AWARD

INTRODUCTION[1]

Behind the facade of Plaintiff's opening rhetoric is perhaps the most revealing evidence of the weakness of her position: her defense of the mammoth punitive verdict depends on the hypothesis that she won a central issue in the case that

---

[1] This round of briefing is concerned solely with the subject of the excessiveness of the jury's $79,500,000 punitive damages verdict. In addressing that subject, we assume for purposes of argument that Plaintiff adduced sufficient evidence to permit the jury reasonably to conclude that Philip Morris had engaged in punishable fraud that was causally related to Jesse Williams' cigarette smoking during the eight years preceding the filing of the lawsuit, and that his smoking during that period was a legal cause of his death. The excessiveness issue would not otherwise be relevant. It may not need to be said — but we will say it anyway — that nothing stated in this round of briefing and argument is to be taken as a concession of any kind by Philip Morris that the evidence was in fact sufficient to support punitive liability. That issue will be the subject of briefing following entry of a judgment.

in fact she lost. The jury unanimously rejected Plaintiffs exhortation to find Philip Morris punishable for the health hazards of cigarettes. Philip Morris **therefore may not be punished for the 400,000 annual deaths attributed to smoking-related disease** (or even Oregon's share of that total), or, indeed, for its marketing of cigarettes despite knowledge that their [p. 2] consumption entails serious health hazards. Yet Plaintiff invokes these national mortality figures no fewer than four times on the first page of her brief alone. Her reason for doing so, and for inveighing irrelevantly against the dangers of smoking throughout the remainder of her memorandum, is plain. Philip Morris **was** found liable for punitive damages only on a novel theory of fraud that affected an undetermined (but surely relatively small) number of people such as Jesse Williams. That ground of liability cannot come close to supporting the jury's gigantic punitive verdict.

Plaintiff's studied disregard of the distinction between the health consequences of smoking and the conduct on which punitive liability was based in this case is well illustrated by the conclusion to Section IV(B) of her Memorandum (at 18–19) (emphasis added):

"In summary, **defendant's misconduct caused a public health disaster** far beyond any known harm produced by any other product; defendant has been perfectly aware of **the harm it has been causing** and the probability of that harm continuing; **defendant has derived enormous profits from its misconduct** over many decades while concealing it from the public."

By "defendant's misconduct," Plaintiff clearly means selling cigarettes. Plaintiff realizes that an eight-figure punitive damages exaction cannot credibly be defended except by defining the punishable conduct so broadly as to allow her to speak in terms of the creation of the world's greatest "public health disaster," with knowledge of those health conse-

quences, and the generation of "enormous profits." But her effort to alter the focus of the case is wholly improper. The only punishable misconduct found by the jury was the defrauding of Jesse Williams by the provision of a rationale that (allegedly) led him to disregard the constant barrage of warnings of the risks of smoking from the Surgeon General, a host of public health agencies, magazine articles and other media, and the very packages containing the cigarettes that he smoked. That misconduct is **far narrower** than Plaintiff's sweeping indictment of Philip Morris for the harms inherently caused by smoking. When the jury's record-shattering punishment is reviewed in relation to the

* * *

[P. 20] based upon "the same conduct" at issue here. In this section of her argument — and this section only — Plaintiff appears to recognize that constitutional constraint.

Having asked the Court not to consider *Henley*, Plaintiff nevertheless, and inconsistently, attaches a copy of the *Henley* trial judge's ruling on the post-trial motions in that case. This is, notwithstanding Plaintiff's asserted desire not to be thrown into the *Henley* briar-patch, a transparent effort to induce this Court to sustain an award in the range of that upheld in *Henley* and to influence this Court by exposing it to adverse comments regarding Philip Morris's conduct made by the California court on a different record and different jury findings. Moreover, in putting forward some "important distinctions" between this case and *Henley* that, she suggests, support an even larger award here, Plaintiff completely ignores the meaningful differences between the two cases. First, unlike *Henley*, this case involved no liability for the "targeting" of young smokers, the focal point of the finding of reprehensibility in *Henley*. Second, California is approximately ten times the size of Oregon; accordingly, any award in this case for Oregon harms should be proportionately smaller. And finally (and importantly) no consideration was

given in *Henley* to Philip Morris's significant remedial undertakings.

IV. PLAINTIFF IS NOT ENTITLED TO PRE-JUDGMENT INTEREST

Plaintiff's request for interest from the date of verdict should be rejected for two reasons. First, ORS 82.010(2)(a) does not authorize the Court to award interest from a date prior to judgment. *See Butler v. Department of Corrections*, 138 Or App 190, 909 P2d 163 (1995); *Gow v. Multnomah Hotel, Inc.*, 191 Or 45, 224 P2d 552, 228 P2d 791 (1951). As the *Gow* court explained (emphasis added):

"It is clear that the amendment to the interest statute was not intended to authorize interest from a date previous to the rendition of judgment by the court. We agree with the contention of the plaintiff only to this extent; that the amended statute does indicate a legislative intent that the actual date of the ministerial entry of judgment or decree would not be controlling **if the court had in fact pronounced judgment previous to its entry**."

IN THE COURT OF APPEALS FOR THE STATE OF OREGON

MAYOLA WILLIAMS, Personal Representative of the Estate of Jesse D. Williams, Deceased,
Plaintiff-Appellant, Cross-Respondent,
v.
PHILIP MORRIS INCORPORATED,
Defendant-Respondent,
Cross-Appellant,
and
RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., and PHILIP MORRIS COMPANIES, INC.,
Defendants.

Multnomah County Circuit
Court No. 9705-03957
CA A106791

DEFENDANT-RESPONDENT, CROSS-APPELLANT PHILIP MORRIS INCORPORATED'S REPLY BRIEF

Appeal From Judgment of May 25, 1999, and Order of June 22, 1999
Multnomah County Circuit Court
Honorable Anna J. Brown

William F. Gary, OSB# 77032 James E. Mountain, Jr., OSB# 75267 Sharon A. Rudnick, OSB# 83083 Harrang Long Gary Rudnick P.C. 101 E. Broadway, Suite 400 Eugene, OR 97401-3114 Telephone: (541) 485-0220	Roy Pulvers, OSB# 83357 Jay W. Beattie, OSB# 87163 Lindsay, Hart, Neil & Weigler, LLP 1300 SW Fifth Avenue, Suite 3400 Portland, OR 97201-5696 Telephone: (503) 226-7677 Attorneys for Defendant-Respondent/ Cross-Appellant
	(Continued on Reverse)

	Brief Filed: June 2001

[P. 2] James S. Coon, OSB# 77145
Raymond F. Thomas, OSB# 79416
Swanson, Thomas & Coon
621 SW Morrison Street, Suite 900
Portland, OR 97205

Telephone: (503) 228-5222
William A. Gaylord, OSB# 73104
Gaylord & Eyerman
1400 SW Montgomery Street
Portland, OR 97201
Telephone: (503) 222-3526

Charles S. Tauman, OSB# 77371
Bennett Hartman & Reynolds
PO Box 19631
Portland, OR 97280
Telephone: (503) 421-5290

Kathryn H. Clarke, OSB# 79189
Attorney at Law
921 SW Washington Street, Suite 764
Portland, OR 97205
Telephone: (503) 224-7963

Maureen Leonard, OSB# 82316
Attorney at Law
520 SW Sixth Avenue, Suite 920
Portland, OR 97204
Telephone: (503) 224-0212
Attorneys for Plaintiff-Appellant/ Cross-Respondent

Hardy Myers, OSB# 64077
Michael D. Reynolds, OSB# 74269
Mary H. Williams, OSB# 91124
Department of Justice
1162 Court Street NE
Salem OR 97310
Telephone: (503) 378-6002
Attorneys for Judgment Creditor
State of Oregon

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* * *

[P. 1] REPLY BRIEF

I. SUMMARY OF ARGUMENT.

The heart of Plaintiff's case is her claim that Philip Morris misrepresented the causal link between smoking and cancer and thereby fraudulently convinced Williams to smoke Marlboro cigarettes. In attempting to prove this claim, Plaintiff faced an insurmountable problem: The only Philip Morris representation Williams ever received concerning smoking and health was the federally mandated health warning. Because Plaintiff could not prove common law fraud, she convinced the trial court to recognize a new claim that she called "fraud on the American public." Now Plaintiff repudiates that theory, but her fallback argument is even weaker. Attempting not only to change the standard but also to shift the burden of proof to the Defendant, Plaintiff now argues that fraud can be presumed because Williams "felt deceived" and Philip Morris did not show that anyone else deceived him. No court has ever upheld a fraud verdict on that basis.

Because Philip Morris's opening brief[1] anticipated many of Plaintiff's arguments and, because reversal on the fraud claim eliminates the punitive damage award, this brief focuses primarily on the fallacies in Plaintiff's fraud claim. We also explain why Plaintiff's arguments save neither her negligence claim nor her punitive damage award.

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[1] Plaintiff's Appellant's Brief is cited here as "App. Br." Plaintiff's Reply and Cross-Responding Brief is cited here as "App. Resp." Philip Morris's Respondent's Brief and Opening Brief on Cross-Appeal is cited here as "Resp. Br." Plaintiff's Abstract is cited as "Pl. Abs."

II. ASSIGNMENT OF ERROR NUMBER ONE: PLAINTIFF FAILED TO PROVE FRAUD.

A. Plaintiff's Fraud Claim Is a Moving Target.

In attempting to defend the fraud verdict, Plaintiff abandons the arguments she made at trial, and instead seeks to rely upon a theory of fraud that the trial court refused to submit to the jury. At trial, Plaintiff argued that Philip Morris had committed a "fraud on the American public." Tr. Vol. 14-B at 102–103. According to Plaintiff, Philip Morris's alleged position that there was

* * *

[P. 13] between the fraud and negligence claims * * *." App. Resp. at 38. But the jury gave unambiguous answers to the specific questions on the verdict form, and this court is not free to speculate that the jury did not mean what it said. The jury decided not to impose punitive damages for the conduct charged as negligence. It is therefore inconsistent with the jury's verdict to justify the punitive damage award based upon that conduct.

Most of the reasons put forward by Plaintiff to support the punitive damage award relate to the general health dangers of smoking. But in light of the verdicts, this court may consider only the specific conduct for which the jury chose to punish Philip Morris — misrepresenting the causal link between smoking and cancer. Given the vast amount of information and warnings about the dangers of smoking that has long been generally published, any misstatements by Philip Morris had the potential to affect only a subset of Oregon smokers — those who clung to Philip Morris's few public statements related to smoking and cancer, while at the same time ignoring the vast amount of information about the dangers of smoking. In fact, the record contains evidence of only one such smoker — Jessie Williams. Evidence of other misconduct by Defendant, apart from the conduct for which

punishment is being imposed, cannot support the punitive award. *Jensen v. Medley*, 170 Or. App. 42, 59 n. 2, 11 P.3d 678 (2000); *Mason v. Householder*, 58 Or. App. 192, 196-97, 647 P.2d 980 (1982).

B. *Parrott* Does Not Dictate the Result Here.

Plaintiff relies heavily upon the Supreme Court's decision in *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001), to defend the high ratio of punitive to compensatory damages resulting from the jury's punitive award, even as remitted. In fact, this case differs significantly from *Parrott*, a case in which the plaintiff's actual economic harm was small, and other lawsuits resulting from the defendant's actions were unlikely. *Parrott*, 331 Or. at 563 (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582, 116 S. Ct. 1589, 134 L. Ed. 2d 809

* * *

Court of Appeals of Oregon.

Mayola WILLIAMS, Personal Representative of the Estate of Jesse D. Williams, Deceased, Appellant-Cross-Respondent,

v.

PHILIP MORRIS INCORPORATED, Respondent-Cross-Appellant,

and

RJ Reynolds Tobacco Company, Fred Meyer, Inc., and Philip Morris Companies, Inc., Defendants.

9705-03957; A106791.

Argued and Submitted Oct. 26, 2001.
Decided June 5, 2002.

Before EDMONDS, Presiding Judge, and ARMSTRONG and KISTLER, Judges.

EDMONDS, P.J.

Defendant Phillip Morris, Inc., is this country's largest manufacturer of cigarettes. Plaintiff is the widow and personal representative of the estate of Jesse Williams (Williams), who began smoking defendant's cigarettes in the early 1950s and continued until his death from a smoking-related lung cancer in 1997. Plaintiff brought this action to recover compensatory and punitive damages for Williams' death. The jury found for plaintiff on her claims of negligence and fraud, awarding economic damages of $21,485.80 and noneconomic damages of $800,000 on each claim. On the negligence claim, it found that Williams' negligence was 50 percent of the cause of his harm and declined to award punitive damages. It awarded punitive damages of $79.5 million on the fraud claim. The trial court reduced the punitive damages award to $32 million, on the ground that the jury's award was excessive under the United States Constitution, and reduced the award of noneconomic damages to

$500,000 in accordance with ORS 18.560(1). *See Greist v. Phillips*, 322 Or. 281, 906 P.2d 789 (1995). It then entered judgment on the fraud claim as modified.[1] Plaintiff appeals, assigning error to the reduction of the punitive damages award. Defendant cross-appeals, assigning error to a number of rulings relating to both the fraud and negligence claims. We reverse on the appeal, affirm on the cross-appeal, and remand for the trial court to enter judgment accordingly.

Because of the jury's verdict, we state the facts most favorably to plaintiff, drawing all reasonable inferences in her favor. *Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or. 487, 490 91, 982 P.2d 1117 (1999). We first describe the facts relating to Williams himself, reserving most of the facts relating to defendant's conduct for our discussion of the various legal issues that the parties raise. Williams began smoking Phillip Morris cigarettes while he was in the Army in Korea in the early 1950s. The Army provided the cigarettes, and other soldiers told him that the smoke would help keep mosquitoes away. He smoked them until the mid 1950s, when he switched to Marlboros, another Phillip Morris brand. He made the switch about the time that defendant repositioned the Marlboro brand from one that was oriented toward women to one of the first male-oriented filter cigarettes. Williams continued to smoke Marlboros or Marlboro Lights for the rest of his life,[2] ultimately increasing to three packs a day. At that point he was spending half of his waking hours smoking.

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[1] The court did not reduce the award of compensatory damages on the fraud claim to reflect the jury's finding of comparative fault, which it would have done if it had based the amount of the judgment on the negligence claim. *See* ORS 18.470.

[2] There is some indication that Williams may have occasionally smoked other Phillip Morris brands. There is no evidence that he smoked non-Phillip Morris cigarettes other than incidentally.

Both Williams' wife and their children encouraged him to stop smoking, telling him that cigarettes were dangerous to his health. In response, he insisted that the cigarette companies would not sell cigarettes if they were as dangerous as his family claimed, and he stated that he had heard on television that cigarettes do not cause cancer. He quoted to them from what he said he had heard about why cigarette smoking was not harmful to a smoker's health. He also told his wife, "the tobacco company, they never said that anything like this is going to harm you. They never said there was anything wrong with the tobacco." When one of his sons would try to get him to read articles about the dangers of smoking, Williams would respond by finding published assertions showing that cigarette smoking is not dangerous.

Williams nevertheless made several unsuccessful attempts to stop smoking, trying various methods that included quitting "cold turkey," reducing the number of cigarettes, using nicotine patches, and using nicotine gum. He did not persist in any of those attempts for a significant time period. Williams' desire for cigarettes was so strong that, if he ran out of cigarettes during an ice storm, he would go to a store for cigarettes, despite the hazards of traveling in such conditions, even if he had no other reason to leave his residence. When his wife prohibited smoking in the family home, he went outdoors to smoke. At restaurants, he would leave his wife in the nonsmoking section during the meal in order to have a cigarette in the smoking section. His smoking was the major source of tension between Williams and his wife. According to an expert witness, Williams was highly addicted to cigarettes, and that addiction was physiological as well as psychological.

Williams was generally in good health and rarely saw a physician. However, in late 1995 and early 1996, he developed a cough and began, at times, to spit up blood. A radi-

ologist interpreted chest X-rays taken at that time as normal.[3] The problem recurred a few months later, and he began losing weight. X-rays and other tests in September and October led to a diagnosis of an inoperable poorly differentiated adenosquamous carcinoma in Williams' right lung. According to expert testimony, the primary cause of that kind of cancer is cigarette smoking.[4] When Williams learned of the diagnosis, he expressed a feeling of betrayal. He said, "those darn cigarette people finally did it. They were lying all the time." He wanted to let other people know that they were being deceived about the harm that cigarettes could do to them. Williams received chemical and radiation therapy that provided only temporary benefits, and he died in March 1997.

Because plaintiff's appeal relates solely to the reduction of the punitive damages award, we begin with defendant's cross-appeal. Defendant first assigns error to the trial court's denial of its motion for directed verdict on plaintiff's fraud claim. Resolving that assignment depends on understanding plaintiff's theory concerning how defendant made material misrepresentations of fact, how the misrepresentations were made to Williams, and how he relied on them. In Oregon the elements of fraud are:

"(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's

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[3] Both plaintiff's and defendant's radiologists at trial agreed that, viewed in retrospect, those X-rays showed a tumor. The course of Williams' cancer would not have been different if it had been diagnosed at that time, according to the testimony.

[4] Defendant's experts testified that Williams had an extremely rare form of lung cancer that is not related to smoking. Plaintiff presented contrary evidence, and the jury by its verdict implicitly accepted plaintiff's view.

ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury."

Conzelmann v. N.W.P. & D. Prod. Co., 190 Or. 332, 350, 225 P.2d 757 (1950).[5] A plaintiff must prove each element of the tort by clear and convincing evidence, or evidence that establishes that the truth of the facts alleged is highly probable. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or. 390, 392, 402, 737 P.2d 595 (1987).[6]

Also, the trial court held that two separate legal principles impose significant limitations on plaintiff's claims. First, ORS 30.905(1), the statute of ultimate repose, extinguishes claims for injuries that occurred more than eight years after a product is first purchased. Plaintiff therefore had to prove that the cigarettes that Williams purchased after September 1, 1988, which the parties treated as eight years before his injury, were a substantial factor in causing his cancer and death. Secondly, under 15 U.S.C. § 1334, the federally required warning that appears on each cigarette package preempts all state regulation of the advertising and promotion of cigarettes that carry the warning. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524, 527–28, 112 S. Ct. 2608, 120 L. Ed .2d 407 (1992), the United States Supreme Court held that the preemption extends to state common-law claims as well as to state statutes and regulations. Thus, plaintiff may

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[5] The Supreme Court has suggested that those nine requirements may unduly fractionalize the essential elements of a fraud claim. For example, proof of reliance on a fraudulent statement may be sufficient in itself to prove the hearer's ignorance of the falsity of the statement. *See Briscoe v. Pittman*, 268 Or. 604, 610, 522 P.2d 886 (1974).

[6] A plaintiff may prove compensatory damages arising out of the fraud by a preponderance of the evidence. *Riley Hill General Contractor*, 303 Or. at 392 93, 737 P.2d 595. Punitive damages require proof by clear and convincing evidence. ORS 18.537(1).

not base her fraud claim on allegations that defendant fraudulently concealed information concerning smoking and health. She is limited to allegations of affirmative misrepresentations. Neither party challenges on appeal the trial court's rulings regarding the statute of ultimate repose and the effect of 15 U.S.C. § 1334.

Defendant's primary argument on cross-appeal focuses on the first, seventh, and eighth elements of fraud, involving the alleged representations and Williams' reliance on them. Defendant asserts that there is no evidence that it made any representation to Williams or that Williams relied on *any* representation that it may have made. Defendant asserts,

"The essence of a claim of fraud is a communication by the defendant which is received and relied upon by the plaintiff. As Plaintiff acknowledged, she could not prove any such communication by Phillip Morris to Williams. Therefore her fraud claim fails."

Defendant interprets the requirement that plaintiff rely on a misrepresentation as meaning that "an alleged false representation must be identified specifically so that it can be critically examined." According to defendant, plaintiff cannot prove her claim without proof that defendant made a specific misrepresentation to Williams.

Defendant interprets the cases on which it relies for support as standing for more than they do. The cases that defendant cites either simply repeat the requirement that there be a misrepresentation, *see, e.g., Gregory v. Novak*, 121 Or. App. 651, 654, 855 P.2d 1142 (1993), or describe the required level of specificity for pleading fraud. *See, e.g., Palmberg v. City of Astoria*, 112 Or. 353, 369–70, 228 P. 107; 229 P. 380 (1924). As we discuss below, a defendant may be liable for fraud for a misrepresentation that creates a false impression even though it is impossible to identify the specific misrepresentation on which a person relied.

Defendant's argument goes to the heart of plaintiff's theory of fraud. In contrast to most fraud cases, plaintiff does not rely on one or a few fraudulent statements made to one or a few identifiable individuals. Rather, her theory is that defendant, in concert with other tobacco companies, engaged in a decades-long public-relations effort to create the impression in the public that there was a legitimate controversy about the health effects of smoking, even though defendant knew that such an impression was false. According to plaintiff's evidence, defendant sought to create enough doubt about the connection between smoking and disease that potential and actual smokers would have something to which they could point to justify beginning or continuing to smoke. In order to evaluate that theory, we first discuss the facts and legal authorities that support it, again stating the evidence in the light most favorable to plaintiff, as required by our standard of review.

The first significant publicity about the effects of cigarette smoking on health came in the early 1950s, based on studies that showed that cigarette tar could cause cancer in mice and that established statistical correlations between smoking and lung cancer. Apparently as a result, total cigarette sales fell in 1953 for the first time in the twentieth century. In response to the publicity and falling sales, defendant, in cooperation with other tobacco companies, began a concerted campaign to undercut the impact on smokers and potential smokers of concerns about the consequences of smoking. The theme of the industry's publicity campaign, which continued into the 1990s, was that the effect of cigarette smoking on health was unclear and that more research was needed before a definitive answer would be possible. As plaintiff explains in her reply brief:

"Defendant understood that it could never prove [that] cigarettes [are] safe; it was enough, however, to make it appear that there was a legitimate controversy over the link between cigarettes and lung cancer so as to give smokers like

Jesse Williams something to tell themselves while they continued smoking. The message [that] defendant communicated to Jesse Williams to create the necessary uncertainty was the message that there was doubt about the causal link between cigarette smoking and human disease."

According to plaintiff, defendant communicated this message to Williams and to smokers and nonsmokers throughout Oregon and the rest of the United States over several decades. What makes the message fraudulent, in plaintiff's view, is that defendant knew that there was no legitimate controversy about the health effects of smoking and that defendant itself had no doubt that cigarette smoking carried serious health risks, including the risk of lung cancer.

Defendant attacks both the legal and factual bases for plaintiff's theory, asserting that there "is not a shred of evidence that Williams ever saw or heard a false or misleading statement made by or attributable to Phillip Morris." Defendant emphasizes plaintiff's concession that she cannot point to a specific misrepresentation that Williams received. Rather, according to defendant, plaintiff is trying to recover for what plaintiff described to the trial court as a "fraud on the American public." Based on that understanding, defendant treats plaintiff's theory as a variation of the securities law concept of "fraud on the market." Under that concept, a purchaser or seller of stock may recover against a party whose fraudulent statements affected the market in which the plaintiff bought or sold, even if the plaintiff never personally received or otherwise knew of the misrepresentations. *See Basic Inc. v. Levinson*, 485 U.S. 224, 248 and n. 27, 108 S. Ct. 978, 99 L. Ed .2d 194 (1988). Defendant then describes its reasons for believing that that theory, to the degree that it is valid in the securities context, does not apply to this case.

We disagree with defendant's effort to characterize plaintiff's theory.[7] Rather, plaintiff's theory fits comfortably within traditional common-law principles.[8] Liability for fraud is not limited to those who deal directly with the injured party. Rather, a person who makes a misrepresentation may be liable to the intended recipients of a misrepresentation without regard to whether the person making the representation intends to defraud a particular person. As the Supreme Court said over 75 years ago, quoting a legal encyclopdia, it is a general rule of law in this country that:

"'Where misrepresentations are made to the public at large, or to a particular class of persons, with the intention of influencing any member of the public, or of the class, to whom they may be communicated, any one injured through proper reliance thereon may secure redress. In such a case it is not necessary that there should be an intent to defraud any particular person; but the representation must of course have been intended for the public, or for a particular class of persons to which the complainant belonged.'" *Coughlin v. State Bank of Portland*, 117 Or. 83, 96, 243 P. 78 (1926), *quoting* 26 CJ 1121–23, § 48bb.

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[7] Plaintiff's statements to the trial court on which defendant relies in support of its characterization were made in the context of her explanation that "there were so many misrepresentations, so many attempts to create false impression, * * * plaintiff cannot now point to one[.]"

[8] In its verdict, the jury answered "yes" to the following question:

"Did defendant make false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied, and if so, were such false representations and reliance a cause of damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988?"

The issue that the jury decided, thus, was based on traditional fraud concepts, not on the theory that defendant claims was the basis of plaintiff's case at trial.

In *Coughlin*, the plaintiff alleged that the defendants published misleading statements of a bank's financial condition and that the plaintiff relied on those statements in deciding to purchase stock in the bank. The Supreme Court held that the plaintiff's complaint stated a claim for fraud and entitled him to present his supporting evidence. *Id.* at 105, 243 P. 78.

In addition, under Oregon law, a defendant may make misrepresentations in many different ways.

"To communicate a representation it is not necessary that the party should speak words, or write a message. The desired result may be accomplished ofttimes by conduct. Indeed, the tongue and the pen are only two of the numerous means of transmitting messages. * * * Indeed, the action for deceit * * * had its origins in false impersonation." *Pennebaker v. Kimble et al.*, 126 Or. 317, 322-23, 269 P. 981 (1928).

As examples of conduct that communicates representations, the *Pennebaker* court mentioned a buoy in a harbor warning of a shoal, a check drawn on a bank implying an amount on deposit to cover it, and Paul Revere's lanterns. It then quoted a New Jersey case, which itself quoted an encyclopedia, that held that a misrepresentation "'may consist in the creation of a false impression by words or acts, or by any trick or device, a deep laid scheme of swindling, or a direct falsehood, a combined effort of a number of associates or the sole effort of a solitary individual.'" *Id.* at 323-24, 269 P. 981, *quoting Berkowitz v. Lyons*, 98 N.J.L. 198, 119 A. 20, 21-22 (1920), *quoting* 12 RCL 232.

Thus, under Oregon law, plaintiff does not need to prove that defendant expressly directed its misrepresentations to Williams or even knew of his existence, so long as plaintiff can show that Williams was within a class of people whom defendant intended to be recipients of and to rely on the message that it conveyed. In addition, the fundamental character of fraud is the communication of a misimpression to induce

another to rely on it. That is something that a defendant may do by a variety of actions as well as by specific statements. Plaintiff alleges that the message that defendant intended to convey was that there was a legitimate controversy about whether there was a connection between cigarette smoking and human health and that it intended to encourage smokers to continue to smoke and not to make the necessary effort to stop smoking. As a smoker, Williams was an intended recipient of defendant's message.

The evidence would permit the jury to find that defendant conveyed the message that plaintiff describes over many years and in many ways, intentionally creating an impression on which it intended Williams and other smokers to rely. The length of the time over which defendant conveyed the message, and the nature of the misrepresentations on which Williams relied, make it unlikely that plaintiff could single out a specific instance from all of the representations that Williams received. Defendant's purpose was to create an impression in the public's mind-including smokers like Williams-that the health issue remained undecided.[9] In late 1953, after the early studies linking cigarette smoking with cancer and the apparently connected fall in cigarette sales, a number of tobacco companies, including defendant,[10] joined

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[9] Plaintiff also presented evidence showing that advertising for Marlboros emphasized images of healthy and strong men. The apparent purpose of that evidence was to show that the advertising created an impression that contradicted the idea that smoking could cause disease. Because there is sufficient evidence of direct representations to support the jury's verdict, we do not need to consider whether defendant's advertising strategy would also be relevant for that purpose.

[10] At the time, defendant was the fifth largest tobacco company in the country. In large part due to the success of Marlboros, its market share grew over the following years until it reached its current status of having approximately half of the domestic market for cigarettes.

to hire a leading public relations firm to find a way to counter their effect. The first step in their subsequent campaign was the publication in January 1954 of "A Frank Statement to Cigarette Smokers."[11] Defendant and the other leading tobacco companies, together with several associations of tobacco growers and marketers, signed the statement, which appeared in 448 newspapers. The publicity covered the great majority of the country's population. In the "Frank Statement," the signatories stated that they believed that their products were not injurious to health and announced the establishment of the Tobacco Industry Research Committee (TIRC) to conduct research into "all phases of tobacco use and health." In 1964, the TIRC was divided into the Tobacco Institute, which focused on public relations and lobbying, and the Council on Tobacco Research (CTR), which supported scientific research.

According to plaintiff's evidence, the "Frank Statement" was the beginning of a "common front" approach among tobacco companies on the health issue, with all companies expressing essentially the same message and using the TIRC and its successors to speak for the industry as a whole. Their original position was to deny that there was a problem; thus in the 1950s and early 1960s Phillip Morris officials represented publicly that the company would "stop business tomorrow" if it thought that its products were harmful. However, as evidence of the harmful effects of tobacco in-

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[11] The trial court ruled that there was no evidence that Williams relied on the "Frank Statement," and plaintiff does not challenge that ruling on appeal. The "Frank Statement" remains relevant, however, as evidence of the beginning of a campaign on which, the jury could have found, Williams did rely. The court instructed the jury that it could consider the "Frank Statement" as relevant to defendant's knowledge or state of mind.

creased,[12] the industry took a different approach. Particularly after the 1964 Surgeon General's report, which emphasized the connection between smoking and lung cancer, the industry focused on keeping the "controversy" alive and calling for "more research" for the purpose of suggesting that the health question about cigarette smoking was not yet clear. In an internal memorandum shortly after the 1964 report, a Phillip Morris vice president explained that it was necessary to "provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking." From the evidence in this case, the jury could properly infer that Williams was one of those smokers to whom defendant was referring.

Defendant and the industry continued throughout the 1970s, 1980s, and 1990s to encourage the impression that there was a genuine and continuing controversy. They did not expressly deny that cigarettes caused cancer but instead provided smokers what a Tobacco Institute memorandum described as "ready-made credible alternatives" to that conclusion by suggesting that there were other factors involved in the diseases of which smokers died and by emphasizing that there was "no proof that smoking causes cancer." The jury in this case could find from the evidence that, in making those statements, they relied on criteria for proof of causation that the scientific community generally either had never accepted or had since discarded. Although defendant and the industry[13] emphasized the need for research, and although it is inferable from the evidence that defendant and other to-

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[12] One of plaintiff's expert witnesses testified that, by the late 1950s, there could no longer be a genuine scientific question about the connection between smoking and lung cancer.

[13] The Tobacco Institute, rather than defendant itself, made many of the statements on which plaintiff relies. The jury could find that in making those statements the Tobacco Institute acted on behalf of defendant and other cigarette manufacturers.

bacco companies conducted a great deal of research into tobacco themselves and sponsored other researchers, they consciously avoided research in the United States that might indicate the biological effects of tobacco use and thus resolve the question that, they claimed, most needed further research. In particular, defendant conducted all sensitive research in a laboratory that it purchased in Europe, taking care to avoid preserving records of the results in this country. The person who was defendant's director of research in the late 1970s and 1980s told a subordinate that one of the director's functions was to "fuel the controversy" as to whether cigarettes cause disease. The director explained that it was his job "to attack outside reports of links between smoking and cancer or smoking and emphysema or things of that sort by maintaining that there's a controyersy and providing the information that would discredit or somehow cast [doubt] on the outside research."

Defendant and the tobacco industry promoted their message through a large number of press releases and statements and through less obvious methods, including influencing the content of apparently neutral articles and cultivating "opinion leaders" who would convey their message. They attempted to used the power of their advertising to procure favorable treatment from the print media. Industry spokespersons appeared on news shows on commercial and public television to state their position on smoking and health issues. The theme of their statements was that the evidence concerning the health effects of tobacco was based primarily on statistical relationships and that there was no proof that a specific tobacco component caused a specific disease. In addition, they suggested that there could be other causes, not connected to tobacco use, for the various diseases attributed to smoking. Although by the early 1990s the industry was forced to agree that tobacco could be a risk factor associated with a number of diseases, its spokesmen still publicly asserted that there was a long chain of intervening events in-

volved before a disease arose from cigarette smoking. Defendant also stated publicly that it did not believe that cigarette smoking was addictive.

There is evidence that Williams received the message that defendant intended to communicate and that the message affected his decision to continue smoking and not to make more serious efforts to overcome his addiction to cigarettes.[14] Williams read the *Oregonian*, other newspapers and magazines, and watched television, all of which were media through which defendant conveyed its message. The evidence includes examples of newspaper stories describing the dangers of tobacco that also contain statements from industry spokespersons insisting that the dangers were not proved and at times attacking the validity of the research suggesting harmful effects. Industry newspaper advertisements conveyed the same message. For instance, in an article published in the *Oregonian* in 1991, an industry spokesman said that the dangers were not proven and argued that the money that the CTR spent on research showed how open-minded the industry was.

Williams' own statements show that he received and relied on defendant's misrepresentations. When Williams' family urged him to stop smoking, he responded that what he had seen on television demonstrated that smoking did not cause cancer. When his son gave him articles on the subject, he responded by finding his own articles that countered the

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[14] Defendant points to the large amount of information available to Williams that emphasized the dangers of smoking to health. Plaintiff does not disagree with that point. Rather, her argument is that defendant created a controversy in order to give smokers like Williams a reason to continue smoking despite the information concerning the dangers. Plaintiff makes the argument, which the jury was entitled to believe from the evidence, that defendant knew that smoking was harmful to health but instead misrepresented that fact to the public for its own economic gain.

dangers of smoking. After his diagnosis, he told his wife that the "cigarette people" had deceived him, that he had been betrayed, and that "they were lying all of the time." The jury could find from the evidence that no one other than defendant and the rest of the tobacco industry promoted the message to which Williams referred. Because of his exclusive use of Phillip Morris products, the jury could also conclude that he meant defendant when he referred to the "cigarette people."[15] Thus, the evidence supports a reasonable inference that Williams purchased cigarettes after September 1, 1988, in reliance on defendant's previous and continuing representations and that those cigarettes were a substantial factor in causing his lung cancer. Consequently, the trial court did not err in denying the motion for a directed verdict on the fraud claim.

Defendant raises no issues concerning the amount of compensatory damages awarded to plaintiff on the fraud claim. Because the award of compensatory damages on the fraud claim is greater than the award of compensatory damages on the negligence claim due to the effect of the comparative negligence verdict, we need not consider defendant's assignments of error concerning the negligence claim. The trial court properly entered judgment for plaintiff for compensatory damages on the fraud claim.

We turn to the issue of punitive damages. We first consider the requirements for an award of punitive damages and the standard by which we review a jury's decision to make

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[15]. Defendant argues that the only message that it is certain that Williams received was the health warning on each pack of cigarettes. There is evidence that Williams handled the packs in such a way that he seldom saw the warning. More significantly, when his wife drew his attention to the warning, Williams responded, "This is what the Surgeon General says, it's not what [the] tobacco company says." The existence of the warning was only one factor for the jury to consider in determining whether Williams reasonably relied on defendant's representations.

such an award. ORS 18.537(1) and ORS 30.925(2) establish the criteria for the jury to apply in deciding whether to award punitive damages and in determining their amount. ORS 18.537(1) provides that, in order to recover punitive damages, the plaintiff must prove by clear and convincing evidence "that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others."

ORS 30.925(2) establishes more specific criteria for awarding punitive damages in a product liability civil action: "Punitive damages, if any, shall be determined and awarded based upon the following criteria.

"(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

"(b) The degree of the defendant's awareness of that likelihood;

"(c) The profitability of the defendant's misconduct;

"(d) The duration of the misconduct and any concealment of it;

"(e) The attitude and conduct of the defendant upon discovery of the misconduct;

"(f) The financial condition of the defendant; and

"(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

If a jury awards punitive damages, both the trial and appellate courts review the amount of the award to determine whether it meets the statutory and constitutional standards.

The legislature has codified the Supreme Court's statement of the nature of that review:

"If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding." ORS 18.537(2); *see Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 551 n. 10, 17 P.3d 473 (2001) (stating that ORS 18.537(2) codifies the standard established in *Oberg v. Honda Motor Co.*, 320 Or. 544, 888 P.2d 8, *cert. den.* 517 U.S. 1219, 116 S. Ct. 1847, 134 L. Ed .2d 948 (1996)).

The heart of the standard for reviewing awards of punitive damages, thus, is determining whether the award is one that a rational juror could make in light of the record as a whole and the legal factors that justify an award of punitive damages on the specific type of claim. In *Parrott*, the Oregon Supreme Court recently held that the rational juror standard is consistent with the federal Due Process standard discussed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed .2d 809 (1996). The Court said that the Gore guideposts, together with the Oregon statutory standard, establish five criteria that a court should consider in determining the range that a rational juror would be entitled to award:[16]

"(1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue * * *; (2) the state interests that a punitive damages

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[16] The trial court held that the jury's award of punitive damages was proper under the Oregon statute, but it reduced the award on the ground that it was excessive under the federal constitution. It reached that conclusion before the decision in *Parrott* and thus did not have the benefit of the Supreme Court's analysis in that case.

award is designed to serve * * *; (3) the degree of reprehensibility of the defendant's conduct * * *; (4) the disparity between the punitive damages award and the actual or potential harm inflicted * * *; and (5) the civil and criminal sanctions provided for comparable misconduct[.]" *Parrott*, 331 Or. at 555, 17 P.3d 473.

Defendant argues that *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed .2d 674 (2001), undercuts the continuing vitality of *Parrott*. In *Cooper Industries*, the United States Supreme Court held that an appellate court must review a trial court's decision on whether an award of punitive damages is excessive as a matter of law rather than for an abuse of discretion.[17] In reaching that conclusion, the Court stated that the amount of a punitive damages award is not a finding of fact that implicates the Seventh Amendment's limitations on judicial review of jury awards. Defendant argues that that holding in *Cooper Industries* weakens the premise of *Parrott*, which defendant identifies as treating the review of a punitive damages award as the review of a factual determination by a jury. Rather, according to defendant, it is now clear that the imposition of punitive damages is not based on findings of fact but on the application of a constitutional standard to the facts of a case. Thus, according to defendant, the rational juror standard of *Parrott* does not satisfy constitutional requirements.

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[17] The phrase that the *Cooper Industries* Court used was "*de novo*" review. As we have previously noted in discussing *Cooper Industries*, that is not a phrase that Oregon courts apply to the review of legal holdings; it is properly limited to the review of factual findings. *See Bocci v. Key Pharmaceuticals, Inc.*, 178 Or. App. 42, 50 n. 2, 35 P.3d 1106 (2001), *rev. pending* (2002); *Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 302 n. 5, 27 P.3d 1092 (2001), *rev. pending*.

We disagree with defendant's understanding of *Cooper Industries*. The background for that case was the Court's long-established rule that the Seventh Amendment forbids appellate review of federal district court refusals to set aside jury awards of compensatory damages on the ground that they are excessive. The Court modified that rule several years before *Cooper Industries* to allow federal appellate courts to review district court determinations for abuse of discretion, at least in diversity cases when the substantive state law provided for that kind of appellate review. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S. Ct. 2211, 135 L. Ed .2d 659 (1996).

In *Cooper Industries* the Court held that a jury's determination of the *amount* of punitive damages was not a "fact" within the *Gasperini* rule and thus was subject to a broader scope of appellate review than it had established in that case. *See* 532 U.S. at 437–40 and n. 11, 121 S. Ct. 1678. However, it also recognized that determining the amount of punitive damages is a "fact-sensitive undertaking" that is appropriately left to the discretion of the jury. *Id.* at 437–38 n. 11, 121 S. Ct. 1678. The Court noted in *Cooper Industries* that the district court had instructed the jury concerning the factors for it to consider in awarding punitive damages. It then stated that, "'[a]lthough the jury's application of these instructions may have depended on specific findings of fact, nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings.'" *Id.* at 439 n. 12, 121 S. Ct. 1678. Finally, the Court reaffirmed that the *Gore* criteria are the appropriate criteria for reviewing an award of punitive damages for excessiveness. *Id.* at 440, 121 S. Ct. 1678.

The Court in *Cooper Industries*, thus, recognized the jury's primary role in finding the facts relevant to an award of punitive damages, in determining whether to make such an award, and in establishing the appropriate amount. *Cooper*

Industries, in our view, does not alter the criteria by which a trial court is to review that award and, thus, does not affect the Oregon Supreme Court's discussion of those criteria in *Parrott*. Rather, what *Cooper Industries* does is to require an appellate court to review the trial court's decision on the amount of punitive damages as a matter of law-that is, by plenary review-rather than for an abuse of discretion. *See also Bocci v. Key Pharmaceuticals, Inc.*, 178 Or. App. 42, 50-51, 35 P.3d 1106 (2001), *rev. pending* (2002). That is consistent with the way that we have always reviewed trial court decisions regarding punitive damages. *See, e.g., MacCrone v. Edwards Center, Inc.*, 160 Or. App. 91, 106, 980 P.2d 1156 (1999), *vacated and remanded* 332 Or. 41, 22 P.3d 758, *adhered to on remand* 176 Or. App. 355, 31 P.3d 513 (2001), *rev. den.* 334 Or. 190 (2002); *Blume v. Fred Meyer, Inc.*, 155 Or. App. 102, 114, 963 P.2d 700 (1998). We therefore follow the *Parrott* criteria, including the reasonable juror standard, in reviewing the jury's award against defendant, and we give no deference to the trial court's decision on the issue.

We first consider defendant's two assignments of error concerning the jury instructions on punitive damages. Defendant assigns error to the trial court's failure to instruct the jury that its award should bear a reasonable relationship to the harm caused to Williams. However, the proposed instruction would also have told the jury not to punish defendant for alleged misconduct towards other persons who might bring their own cases and receive their own punitive damages awards. In *Parrott*, the Supreme Court made it clear that the potential injury to past, present, and future consumers as the result of a routine business practice is an appropriate consideration in determining the amount of punitive damages. 331 Or. at 563, 17 P.3d 473. The proposed instruction's speculative reference to unknown other lawsuits by unknown other plaintiffs was contrary to that principle. It was also inconsistent with ORS 30.925(2)(g), which allows

the jury to consider other punishments already imposed on the defendant. Because the proposed instruction was incorrect in that respect, we do not need to consider whether the rest of it was correct. The trial court properly rejected it. *See Simpson v. Sisters of Charity*, 284 Or. 547, 560, 588 P.2d 4 (1978) (trial court not required to give instruction that contains, in part, erroneous language).

Defendant also assigns error to the trial court's instruction that the maximum amount that the jury could award was $100 million. It argues that that instruction told the jury that it could award an amount that would have been far greater than what was constitutionally permissible. Plaintiff's complaint prayed for $100 million in punitive damages. The trial court in its instruction merely told the jury what plaintiff sought. Defendant did not move to reduce the amount of the prayer on the ground that it was greater than the evidence would support or that it sought an impermissible amount. In addition, telling the jury the upper limit that the pleadings establish for its verdict is consistent with ordinary Oregon trial practice. *See Wiebe v. Seely Administrator*, 215 Or. 331, 357, 335 P.2d 379 (1959).

We now evaluate the jury's award for excessiveness under the previously stated criteria. We begin by stating the relevant evidence that we have not previously described, again stating it in the light most favorable to plaintiff. *Parrott*, 331 Or. at 556, 17 P.3d 473. In addition to the evidence that defendant intentionally made false representations to Williams and that he relied on them to his detriment, plaintiff points to five categories of evidence to support the jury's award of punitive damages in the amount of $79.5 million.[18]

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[18] Defendant asserts that, because the jury declined to award punitive damages on the negligence claim, it could consider only evidence relevant to the fraud claim in determining whether to award punitive damages and in determining their amount. The evidence that defendant seeks to exclude from our review of the jury's deci-

First, there is evidence that defendant knew that smoking caused lung cancer and other diseases at the same time that it publicly claimed that the issue was unresolved. As early as 1958, three British scientists, meeting with scientists and tobacco executives, reported that industry representatives believed that smoking could lead to lung cancer. In 1961, defendant's director of research stated internally that "carcinogens are found in practically every class of compounds in smoke" and that the best that the company could hope to do was to reduce their amounts. Later, defendant's internal memoranda made similar points, in some instances suggesting that the company could not admit the facts publicly because of the probable adverse legal consequences.

Second, defendant recognized that nicotine was both addictive and the primary reason why people continued smoking. The strongest statement of this fact may have been a presentation by a Phillip Morris scientist in 1972. In that presentation, he stated that the "cigarette should be conceived not as a product but as a package. The product is nicotine[.]" He continued, "[t]hink of the cigarette pack as a storage container for a day's supply of nicotine," and "[t]hink of the cigarette as a dispenser for a dose of nicotine." Defendant spent considerable effort in the following years studying the best way to deliver the optimal dose of nicotine in each cigarette and to increase the effectiveness of the nicotine, resulting in the discovery of a number of ways of manipulating the material in cigarettes for that purpose without actually adding nicotine to it.

Also, defendant carefully evaluated smoking cessation programs and technologies, concluding that alternative sources of nicotine, such as patches or gum, were ineffective

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sion relates to the consequences of defendant's fraudulent conduct, which is certainly relevant to an award of punitive damages. The evidence was admitted without limitation, and the jury was entitled to consider it.

in the absence of ongoing behavioral therapy. Because that therapy was expensive and time consuming, defendant thought it unlikely that it would have a serious effect on the number of smokers. Defendant's public relations program of creating a controversy that would give smokers a "crutch," a reason to believe that there were serious doubts that tobacco was harmful, thus, would discourage them from making the significant effort that was necessary to stop smoking. The "controversy" created by the tobacco industry was defendant's method of counteracting the information that otherwise suggested the harmfulness of cigarettes. Such an approach was aimed particularly at highly addicted smokers like Williams, who would search for any justification to continue smoking.

Third, defendant conducted research in such a way as to avoid studying the health effects of smoking, all the while asserting publicly that there was need for further research on that very issue. It used the CTR's research as a shield and as a source for expert witnesses at congressional hearings and in lawsuits against it rather than for research into the relationship between smoking and disease. The jury could have found on the record in this case that defendant specifically avoided testing with live animals and testing actual production cigarettes. On one occasion when defendant did test production cigarettes, the results were unfavorable, and it destroyed them. It is inferable from the record that tobacco industry lawyers, rather than scientists, set the general direction of the CTR's research program and that they did so for the purpose of protecting the industry's litigation position rather than to resolve scientific questions.

Also, the jury could have found that the tobacco industry had a "gentleman's agreement" not to conduct research beyond the scope of the CTR's efforts. Thus, to the degree that defendant conducted animal testing that was relevant to the relationship between cigarette smoking and human disease, it did so in a European laboratory and took precautions to en-

sure that the results of that research did not appear in its American records.

Fourth, defendant's actions caused harm to many others in Oregon besides Williams. Although a tobacco industry survey indicated that 85 percent of smokers wished that they had never started smoking, defendant concealed information that the addictive effects of nicotine made it difficult for them to stop without significant assistance. The fraudulent statements from defendant and the rest of the industry reinforced those addictive effects by giving smokers a reason not to make the necessary effort to break the addiction. The jury could find on this record that defendant's public relations campaign had precisely the effect that defendant intended it to have and that it affected large numbers of tobacco consumers in Oregon other than Williams. It is also reasonably inferable from the evidence that defendant's products, used as defendant intended them to be used, caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but nonfatal health problems with their attendant economic consequences.

Finally, cigarettes are relatively inexpensive to produce, and they provide a large profit margin. By maintaining a large population of smokers through fraudulent representations, defendant protected those profits. At the time of trial, defendant's net worth was over $17 billion. Its profit from cigarette sales in 1996, the year that Williams was diagnosed with lung cancer, was over $2 billion. In 1997, the year that Williams died and the most recent year for which figures were available at the time of trial, defendant's profit was $1.6 billion.

In light of the above evidence, we turn to the applicable criteria for an award of punitive damages.[19] First, the jury

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[19] The legislature first adopted those criteria for awarding punitive damages in 1979, Or. Laws 1979, ch. 866, § 3, although at least some of them reflect previous case law. Defendant thus was on

could find that there was a strong likelihood at the time of defendant's fraudulent statements that serious harm would arise from them. ORS 30.925(2)(a). Even at the beginning of defendant's public relations scheme, it was generally recognized that cigarette smoking had probable serious health consequences. Viewing the evidence most favorably to plaintiff, there was little doubt about the relationship between smoking and lung cancer by the late 1950s, and there was absolutely no basis for a genuine dispute on the issue by the 1970s and 1980s. Throughout that period, defendant continued its public relations campaign asserting that smoking had not been proven to be harmful and that more research was necessary. Its campaign was intended to give smokers a crutch to justify their continued smoking, and the jury could reasonably conclude that the message that defendant disseminated would put all of those who relied on it at risk and would cause serious harm to many of them.

Second, the jury could find that, by 1958, defendant was aware of the likelihood of the harm that its actions would cause and that it was certainly aware of that harm by the 1970s. ORS 30.925(2)(b). Third, defendant's misconduct was highly profitable, producing billions of dollars of profit over many years. There is evidence that defendant believed, in fact, that its misrepresentation of the dangers of smoking was important to its ability to continue in the cigarette business. ORS 30.925(2)(c). Fourth, defendant's misconduct lasted over four decades, and defendant concealed it as long as it could. The extent of defendant's actions did not become clear until judicially-required releases of documents occurred in the 1990s. ORS 30.925(2)(d). Fifth, there is no evidence

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notice of the possibility of a punitive damages award under Oregon law for its conduct 17 years before Williams was diagnosed with lung cancer and 9 years before September 1, 1988, the beginning of the period during which plaintiff had to prove that cigarette smoking was a substantial factor in causing Williams' death.

that defendant showed any regret or changed its conduct upon the discovery of its actions. ORS 30.925(2)(e). Sixth, defendant is a wealthy corporation, and a small award of punitive damages would have little effect on it. ORS 30.925(2)(f). Finally, there is no evidence in the record of other punishment (including other punitive damages awards) inflicted upon defendant as a result of its misconduct. ORS 30.925(2)(g).

We turn next to the criteria that the United States Supreme Court identified in *Gore* and that the Oregon Supreme Court adopted in *Parrott*. The first *Gore* criterion concerns the state interests that an award of punitive damages is designed to serve. Those interests involve the health and lives of the state's citizens and residents. It is difficult to perceive how the state could have any greater interest than the preservation of the health and the lives of the citizens who make up the state. In *Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 27 P.3d 1092 (2001), *rev. pending* (2002), we held that there is a state interest in preventing injury to Oregon consumers from defective products and in punishing manufacturers who fail to investigate the safety of their products. 175 Or. App. at 306, 27 P.3d 1092. Here, the jury could find that defendant did not simply fail to investigate the safety of its products; it knew that they were unsafe and entered on a course of fraudulent conduct designed to encourage Oregon smokers to continue using those products despite the danger to their health.

The second *Gore* criterion concerns the reprehensibility of the defendant's actions. The jury could find from the evidence that defendant sought to make large amounts of money by engaging for more than four decades in a fraudulent scheme to induce people to use or continue to use a product that could cause serious illness or death to a significant percentage of those who used it as intended. Because defendant's product affected the lives and the health of consumers as well as the economic interests of both consumers and non-

consumers, and because it occurred over an extended period, that conduct is far more reprehensible than the unlawful methods of selling used automobiles by the defendant that the *Parrott* court considered. In light of the Supreme Court's decision in that case, the comparative harm in this case strongly suggests an award of punitive damages.

The third *Gore* factor is the disparity between the punitive damages award and the actual or potential harm inflicted. Defendant argues that the primary issue in evaluating this factor is the ratio between plaintiff's compensatory damages and the punitive damages award. It notes that the jury's verdict would produce a ratio of 97 to 1, while the ratio after the court's remittitur is 39 to 1. It discusses a number of other cases in which the ratios between the plaintiff's injuries and the punitive damages award were considerably less and refers to several United States Supreme Court cases that appeared to give the ratio significant weight in determining whether an award was excessive. The difficulty with this approach is that, as the Oregon Supreme Court pointed out in *Parrott*, the federal court's treatment of the subject demonstrates that "no 'simple mathematical formula' controls our review of the ratio of punitive damages to actual and potential harm." 331 Or. at 563, 17 P.3d 473. That is not surprising, because it is inherently impossible to capture all of the qualitative factors that go into determining the appropriate level of punishment in one simple ratio.

In *Parrott*, the Supreme Court affirmed a verdict in a case of consumer fraud in which the ratio between punitive and compensatory damages was 87 to 1. In doing so, it explained:

"Because defendant's tortious conduct was a routine part of its business practice that it was unwilling to change, we also consider the potential injury that its misconduct may have caused to past, present, and future customers. Additionally, although the actual economic harm that plaintiff suf-

fered in this proceeding was relatively small, that harm was the result of defendant's 'particularly egregious' acts." 331 Or. at 563, 17 P.3d 473.

In this case, defendant's actions were part of its business strategy for over 40 years and, in defendant's own assessment, significantly contributed to its profitability. It is thus appropriate to consider the effects of defendant's actions on persons other than Williams in determining the amount of punitive damages. As we have already discussed, defendant's actions, even more than those of the defendant in *Parrott*, were "particularly egregious" and thus justify particularly strong judicial punishment. *See Lane County v. Wood*, 298 Or. 191, 203, 691 P.2d 473 (1984) (purpose of punitive damages is "not to compensate an injured party, but to give bad actors a legal spanking"). In light of the 87 to 1 ratio in *Parrott*, we see nothing in a ratio of 97 to 1 that raises our judicial eyebrows, given the egregious nature of defendant's conduct as implicitly determined by the jury.

Beyond that, defendant's narrow focus on the ratio between punitive and compensatory damages ignores the underlying purpose for awarding punitive damages, which is to punish and deter a wrongdoer. The reprehensibility of the defendant's actions, the number of people affected or potentially affected, and indications that the defendant will not change its actions without punishment are all relevant factors. It is also clear that the defendant's wealth is an important consideration; an award that might be a serious punishment for one defendant could be only a minor inconvenience for another. *See Hicks v. Lilly Enterprises*, 45 Or.App. 211, 217, 608 P.2d 186 (1980). Oregon law has recognized that principle for over 60 years. *See State ex rel Thesman v. Dooley*, 270 Or. 37, 42, 526 P.2d 563 (1974); *Lamb v. Woodry*, 154 Or. 30, 47, 58 P.2d 1257 (1936); *see also* Restatement (Second) of Torts, § 908 and comment e (1979). In this case, defendant's net worth is over $17 billion, and its profits for the year closest to the trial were over

$1.6 billion, or approximately $30.7 million per week. The jury's award of $79.5 million, thus, is equal to a little more than two and a half weeks' profit.

Thus, there are at least two factors for determining the disparity between the punitive damages award and the actual harm inflicted in addition to the ratio to which defendant gives so much attention. First, when the defendant's conduct involves a course of conduct that has affected people other than the plaintiff, the jury may properly consider the effect of that conduct on those other people. Although defendant is legitimately concerned that there may be future punitive damages awards that, combined with the one in this case, would be excessive in total, ORS 30.925(2)(g) provides the appropriate method of avoiding that result. By requiring the jury and court to consider the total deterrent effect of other punishment imposed on defendant, including other punitive damages awards, it will permit future juries and courts to take previous awards into account when they set or evaluate punitive damage awards in future cases. The alternative to that approach is to limit punitive damages in this case to an amount that may be inadequate, based on speculation of what might happen in some unknown future case.

The second additional factor is that there is more to the issue of proportionality than the dollar amounts involved. First, when the record contains evidence of the defendant's financial condition, determining the proper relationship between the punitive award and the actual harm may well include consideration of that evidence. The same dollar amount will have a very different effect, for example, on a small, struggling business from what it will have on a large, profitable one. Second, some kinds of harm cannot be fully captured in money value. In this case, for example, the jury could have found that defendant's actions resulted in Williams' death; based on that finding, it could have believed, in

light of defendant's profits, that only a large award would be proportionate to the harm that defendant caused.[20]

The final *Gore* criterion concerns the civil and criminal penalties that could be imposed for comparable misconduct. The court in *Parrott* appears to have treated this factor as primarily related to fair notice to the defendant of the extent of punishment that the state might impose for its actions. 331 Or. at 563-64, 17 P.3d 473. Oregon law does not provide administrative or other civil sanctions for defendant's actions. Plaintiff argues, however, that first-degree manslaughter, ORS 163.118(1)(a), and second-degree manslaughter, ORS 163.125(1)(a), which impose penalties for reckless homicide, are relevant to this factor. The problem, as defendant points out, is that it is difficult to compare the criminal sentences available under the manslaughter statutes with the economic sanction of punitive damages, particularly when the defendant is a corporation. We do not believe that this factor plays a major role one way or the other. To the extent that the issue involves adequate notice to defendant, the established Oregon law of punitive damages, including ORS 30.925(2), was sufficient to alert defendant to the possible punishment for its fraudulent scheme. After consideration of all of the above factors, we conclude that the jury's

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[20] Defendant also suggests that it is being punished for its participation in a public debate concerning a matter of general importance and that that punishment violates Article I, section 8, of the Oregon Constitution. Defendant ignores that the jury could have found that, rather than engaging in a public debate, defendant made representations concerning the relationship between smoking and human health either without believing them to be true or in reckless disregard of their truth or falsity and that it did so to induce people like Williams to continue using its products. That kind of fraud is not something that the Oregon Constitution protects. *See Smallwood v. Fisk*, 146 Or. App. 695, 934 P.2d 557 (1997) (punitive damages for fraud are a historical exception to Article I, section 8).

award was not excessive under the criteria identified in *Parrott* and *Gore*, and the trial court therefore erred in reducing it.

Finally, defendant argues that the trial court erred in refusing to exercise its discretion under ORS 18.537(3) to reduce the jury's award to reflect a settlement that it and other cigarette manufacturers had reached with 46 states. That statute authorizes a court to reduce an award if the defendant establishes that it has taken reasonable remedial measures to prevent recurrence of the conduct that gave rise to the punitive damages award. Defendant argues that the settlement with the state qualifies under the statutory criteria. The trial court denied the motion on the ground that the settlement did not constitute an unequivocal acceptance of responsibility, which it believed was necessary to meet the criteria for a reduction in the jury's award under the statute. Plaintiff also argues that, to the extent that the statute permits a court to reduce a jury's award based on evidence that was not before the jury, the statute violates Article VII (Amended), section 3, of the Oregon Constitution.

We do not need to decide whether either defendant or plaintiff correctly understands the import of the statute. The factual foundation of defendant's argument is the Consent Decree and Final Judgment[21] that resolved the litigation between defendant and the State of Oregon. Section VI(G) of that judgment provides, in part:

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[21] Despite its caption, the document at issue is simply a judgment. Since the effective date of the Oregon Rules of Civil Procedure, "judgment" has been the sole correct term for the final determination of the rights of the parties in a civil action. "Decree," which formerly referred to the final determination of the rights of the parties in a suit in equity, is no longer appropriate. *See* ORCP 2; ORCP 67 A; *Webber v. Olsen*, 330 Or. 189, 192 n. 1, 998 P.2d 666 (2000).

"*Neither this Consent Decree and Final Judgment nor any public discussions, public statements or public comments* with respect to this Consent Decree and Final Judgment by the State of Oregon or any Participating Manufacturer or its agents *shall be offered or received in evidence in any action or proceeding for any purpose* other than in an action or proceeding arising under or relating to this Consent Decree and Final Judgment." (Emphasis added.)

The trial court could not use the settlement as a basis for reducing the jury's verdict without the consent judgment somehow being in evidence. By its own terms, which reflect defendant's agreement with the state and the other parties to the litigation that led to the judgment, the settlement was not admissible for the purpose for which defendant seeks to use it in this case. The trial court did not err.

We do not discuss the remaining arguments of the parties because there would be no benefit to the bench or bar from our doing so.

On appeal, reversed and remanded with instructions to enter judgment on jury verdict; affirmed on cross-appeal.

Or. App., 2002.

Williams v. Philip Morris Inc.

182 Or. App. 44, 48 P.3d 824, Prod. Liab. Rep. (CCH) P 16,327

CERTIORARI GRANTED

SUPREME COURT OF THE UNITED STATES

No. 05-1256

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

May 30, 2006

The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition.

(1)

Supreme Court, U.S.
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In the Supreme Court of the United States

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v.

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On Writ of Certiorari to the Supreme Court of Oregon

BRIEF FOR THE PETITIONER

KENNETH S. GELLER
EVAN M. TAGER
NICKOLAI G. LEVIN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick P.C.
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
DANIEL B. KIRSCHNER
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

MURRAY R. GARNICK
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

An Oregon jury held Philip Morris USA ("Philip Morris") liable for fraud and awarded $79.5 million in punitive damages – 97 times the compensatory damages awarded by the jury. The jury returned this verdict after plaintiff's counsel urged it to impose punishment for all smoking-related harms suffered by Oregonians. On remand from this Court for reconsideration in light of *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), the Oregon Supreme Court held that the jury could properly punish Philip Morris for harms its conduct may have caused to non-parties. Furthermore, stating that the jury could have found that Philip Morris's conduct was "extraordinarily reprehensible" and that the conduct could have come within the statutory definition of manslaughter, the Oregon Supreme Court held that those two factors "provide[d] a basis for overriding" the constitutional requirement of a reasonable relationship between punitive and compensatory damages. The questions presented are:

1. Whether the Oregon courts deprived Philip Morris of due process by permitting the jury to punish Philip Morris for harms to non-parties.

2. Whether, in considering a claim that a punitive award is unconstitutionally excessive, a court may disregard the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm whenever it concludes that (i) the jury could have found the defendant's conduct to be highly reprehensible and (ii) the conduct could come within the statutory definition of a crime.

RULE 29.6 STATEMENT

Petitioner Philip Morris USA's corporate parent is Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns ten percent or more of Philip Morris USA's stock.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Oregon Supreme Court (Pet. App. 1a-34a) is reported at 127 P.3d 1165. The decision of the Oregon Court of Appeals on remand from this Court (Pet. App. 35a-75a) is reported at 92 P.3d 126.

JURISDICTION

The decision of the Oregon Supreme Court was issued on February 2, 2006. The petition for a writ of certiorari was filed on March 30, 2006, and granted on May 30, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT

A. Jesse Williams.

Jesse Williams started smoking in or about 1950, as a 21-year-old soldier serving in Korea, because fellow GIs told him that the smoke would keep mosquitoes away. J.A. 56a, 126a-127a, 130a. After his military service Williams settled in Portland, Oregon, where he spent the rest of his life. *Id. at* 128a-131a. He started smoking Marlboro cigarettes, which are manufactured by Philip Morris, in about 1955. *Id.* at 47a-48a. Williams smoked an average of two packs of cigarettes per day for 45 years. *Id.* at 34a, 133a, 155a.

Williams had been taught as a child that smoking was unhealthy, and he and his wife, in turn, admonished their children not to smoke. J.A. 140a, 151a-152a, 181a-182a. Citing the dangers of smoking, Williams's wife, children, and physician repeatedly urged him to quit. *Id.* at 124a, 131a-132a, 146a-148a, 154a. But Williams did not like to be reminded about the risks of smoking. *Id.* at 131a-132a, 133-134a. According to his wife, Williams said that "'the tobacco companies[] don't even say they're cancer sticks, so I can smoke them.'" *Id.* at 153a. His wife frequently pointed

to the warning labels on cigarette packages and told him that cigarettes would kill him. Williams would respond: "Phooey. * * * This is what the Surgeon General says, it's not what [the] tobacco company says." *Id.* at 133a. According to his wife, Williams gave no credence to the Surgeon General's warnings because he believed that the tobacco companies would not sell a harmful product. *Id.* at 131a-133a. She explained that "he would say 'Well, honey, you see I told you * * * cigarettes are not going to kill you, because I just heard this so-and-so guy on TV, and he said that tobacco doesn't cause you cancer!'" *Id.* at 138a.

In October 1996, Williams was diagnosed with inoperable lung cancer. *Id.* at 127a, 150a-151a. According to his wife, he responded to the diagnosis by saying "'those darn cigarette people finally did it. They were lying all the time.'" *Id.* at 149a. Williams died in March 1997.

B. Trial And Verdict.

Williams's widow ("plaintiff") sued Philip Morris. She alleged that the company had falsely represented that the link between cigarettes and cancer had not been scientifically established and that those representations caused Williams to continue smoking. Plaintiff also claimed that the company was negligent in (1) selling cigarettes that it knew or should have known were addictive and caused cancer; (2) manipulating the contents of cigarettes in order to maintain and enhance their addictive effects; (3) failing to test cigarettes in ways likely to link smoking with human disease; and (4) failing to make a safer cigarette.

Plaintiff's trial evidence covered topics ranging from Philip Morris's research practices to its litigation positions, but her principal theory was that Philip Morris had engaged in a decades-long campaign to persuade the public that smoking does not cause cancer. In support of this theory, plaintiff introduced into evidence a sum total of 14 public statements about the causal link between smoking and cancer that were

attributable to Philip Morris. It was undisputed that only seven of those statements ever appeared in the popular media, and there was no evidence that Jesse Williams read, heard, or was aware of *any* of the 14 statements.[1]

Both plaintiff and the Oregon Court of Appeals acknowledged the lack of evidence that Williams had ever seen or heard any statement attributable to Philip Morris. Pet. App. 37a, 41a. As the trial court observed, the absence of proof of reliance on "a particular misrepresentation directly associated with Philip Morris" made plaintiff's claim "something new" (J.A. 158a), adding: "We haven't seen this particular approach to a fraud claim in Oregon law. And it's a tough one." *Ibid.* The court nevertheless sent the claim to the jury.

In both his primary and his rebuttal closing arguments, plaintiff's counsel repeatedly urged the jury to punish Philip Morris not only for the harm caused to Williams, but also for the smoking-related harms allegedly suffered by other Oregonians who were not identified and whose circumstances were never presented to the jury. For example, in closing argument he urged:

> When you determine the amount of money to award in punitive damages against Philip Morris * * * [i]t's fair to think about how many other Jesse Williams in the last 40 years in the State of Oregon

---

[1] Philip Morris introduced undisputed evidence of widespread awareness of the risks of smoking from at least the 1950s onward. J.A. 166a-169a. In 1964, the Surgeon General issued his landmark Report linking cigarettes to lung cancer. *Id.* at 172a. That Report was front-page news in newspapers across the nation – including *The Oregonian*. *Id.* at 17a, 175a. Shortly thereafter, Congress passed legislation requiring every cigarette package sold in the United States after January 1966 to display a prominent health warning. *Id.* at 276a-278a.

> there have been. It's more than fair to think about how many more are out there in the future.
>
> * * *
>
> In Oregon, how many people do we see outside, driving home, coming to work, over the lunch hour smoking cigarettes? For every hundred, cigarettes that they smoke are going to kill ten through lung cancer. And of those ten, four of them, or three of them I should say, because the market share of Marlboros is one-third * * *.

J.A. 197a, 199a.

In order to reduce the risk that the jury would punish it for harms allegedly suffered by non-parties, Philip Morris requested the following jury instruction:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit.

Pet. App. 17a-18a. The trial court refused to give this instruction, choosing instead to tell the jury that it was free to award any amount of punitive damages up to $100 million. J.A. 284a. The jury was not told the reason why the punitive damages were limited to $100 million: it was the amount arbitrarily requested in plaintiff's complaint. Pet. App. 9a.

The jury found for plaintiff on both her fraud and product design claims and awarded $821,485 in compensatory dam-

ages (reduced to $521,485 pursuant to Oregon's statutory cap on wrongful death damages). The jury also awarded $79.5 million in punitive damages for fraud, while declining to impose punitive damages on respondent's other claims, including defective design.

On post-trial motions, the trial court found the punitive award "excessive under federal standards" and reduced the punitive damages to $32 million – still 39 times the jury's compensatory award. J.A. 307a-308a.

C. Appeal And GVR.

On appeal, the Oregon Court of Appeals rejected Philip Morris's contention that the trial court should have given the "harm to non-parties" instruction, concluding that the proposed instruction misstated the applicable law. *Williams* v. *Philip Morris Inc.*, 48 P.3d 824 (Or. Ct. App. 2002). It further held that the jury's $79.5 million punitive damages verdict was not excessive and reinstated it. *Id.* at 843.

After the Oregon Supreme Court denied review, Philip Morris petitioned this Court for a writ of certiorari, raising both the "punishment for harm to others" issue and an excessiveness claim. This Court granted the petition, vacated the judgment, and remanded to the Oregon Court of Appeals for reconsideration in light of *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). *Philip Morris USA Inc.* v. *Williams*, 540 U.S. 801 (2003).

D. Proceedings On Remand.

On remand, the Oregon Court of Appeals again rejected Philip Morris's claims of instructional error, expressly holding that it was appropriate for the jury to punish for harms to non-parties. Pet. App. 75a. The court also adhered to its prior ruling that the award was not excessive, relying primarily on unproven harms to non-parties to justify the massive award.

The Oregon Supreme Court affirmed. According to that court, the jury could have found that Philip Morris had "deceived other smokers in Oregon" besides Jesse Williams and that Philip Morris's products "caused a significant number of deaths each year in Oregon during the pertinent time period * * *." Pet. App. 7a-8a. Although plaintiff proffered no evidence purporting to show that any Oregon smoker other than Williams sustained injuries in reliance on any alleged misrepresentations (as distinct from injuries due simply to smoking), the court held that widespread reliance and injury could be inferred. *Id.* at 8a n.1.

The Oregon Supreme Court then addressed Philip Morris's contention that the jury should have been instructed not to punish for harms allegedly suffered by non-parties. The court rejected the argument "that [*State Farm*] prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to non-parties." *Id.* at 18a. It concluded that the restriction articulated in *State Farm* applies only when the harm to non-parties arises from conduct that is not similar to that which injured the plaintiff. *Id.* at 19a-20a.

The Oregon Supreme Court went on to consider the three "guideposts" announced in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), for determining whether a punitive award is unconstitutionally excessive: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of punitive to compensatory damages; and (iii) legislatively established penalties for comparable conduct.

Taking the evidence in the "light most favorable to the plaintiff," the court stated that the record would have permitted a jury finding that Philip Morris's conduct was "extraordinarily reprehensible." Pet. App. 23a. As the court interpreted the evidence, the jury could have found that Philip Morris's misconduct affected "a broader class of Oregonians" who kept purchasing cigarettes and therefore be-

came ill or died. *Ibid.* Thus, the court concluded, "the first *Gore* guidepost favors a very significant punitive damage award." *Id.* at 24a.

The court held that the third *BMW* guidepost – the legislatively established penalties for comparable misconduct – also supported a large punitive award: "Viewing the facts in the light most favorable to plaintiff, Philip Morris's actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter." Pet. App. 27a. The court noted that the fine for a corporation convicted of manslaughter at that time was $50,000. *Id.* at 28a-29a.

The court recognized that "the second *Gore* guidepost is not met" (Pet. App. 31a), but upheld the award anyway. It acknowledged that, because the punitive award is 97 times the jury's compensatory award and 152 times the capped award, "[a]ll arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the [U.S. Supreme] Court has said ordinarily will apply in the usual case." *Ibid.* Nevertheless, the court said, "the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may arise from a double-digit ratio." *Id.* at 33a.

SUMMARY OF ARGUMENT

I.

Only three years ago, this Court held that a defendant cannot be punished in an individual action for harms to persons other than the plaintiff. "Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct," which violates due process. *State Farm*, 538 U.S. at 423. The Oregon Supreme Court nevertheless held such punishment to be permissible, so long as the non-party harms arose from conduct similar to that which injured the plaintiff. On that basis, the court affirmed the trial

court's denial of Philip Morris's requested jury instruction, which would have informed the jury that it could not punish for harms to non-parties.

The Oregon courts' resolution of this issue is impossible to square with *State Farm* or this Court's other precedents. The practice of allowing a jury in an individual case to punish for harms to non-parties virtually ensures the arbitrary deprivation of property against which the Due Process Clause protects. Under the Oregon regime, an individual plaintiff is not bound by the results of another individual's suit. Accordingly, any defendant that is sued repeatedly for injuries allegedly arising from a single course of conduct is in danger of being punished repeatedly for the same harms. This is so even if, like Philip Morris, it wins most of the cases brought against it on the same legal theories. Furthermore, given that these non-parties are not identified and their individual circumstances are not presented in court, there is simply no practical way for a defendant to respond to allegations of widespread harm by demonstrating that most or all of the non-parties do not have a valid claim.

Unsurprisingly, there is no historical precedent for permitting collective punishment in an individual action. To the contrary, courts have historically stood steadfast against imposing punitive damages for injuries sustained by non-parties, recognizing – as has this Court – that allowing such punishment would create an unfair risk of duplicative and excessive punishment. In this case, where the jury awarded $79.5 million to an individual plaintiff based on the defendant's conduct toward non-parties, a new trial is the only adequate remedy.

II.

The Oregon Supreme Court also violated due process and deviated from this Court's precedents in holding that any constitutional concern arising from the disproportionate 97:1 ratio of punitive to compensatory damages was "over-

rid[den]" by the possibility that the jury found Philip Morris to have engaged in "extraordinarily reprehensible" conduct that met the statutory definition of manslaughter. Pet. App. 33a. Under this Court's jurisprudence, none of the three *BMW* guideposts can trump the others. Instead, each of the three has a distinct role to play in ensuring that there are "reasonable constraints" on the amount of punitive damages that may be exacted from a defendant.

The constraining functions of the reasonable-relationship requirement are different from those performed by the other two guideposts in critical respects. The ratio guidepost, unlike the reprehensibility guidepost, provides an objective measure of excessiveness. It also helps to protect against punishment for harms to non-parties and limits the effect of an aberrational verdict by requiring that the punitive damages be proportionate to the harm to the plaintiff. Although the ratio guidepost may not be *sufficient* to ensure against arbitrary punishment, it is a *necessary* safeguard. The other two guideposts are insufficient to provide the necessary protection against duplicative and excessive punishment.

That the Oregon Supreme Court erred in upholding a 97:1 ratio of punitive to compensatory damages should be clear. It remains to determine what ratio would be within constitutional bounds. We submit that under long-established practice and this Court's precedents, when the compensatory damages are substantial, the constitutional maximum punishment is between zero and four times the amount of compensatory damages. Where in that range the maximum falls depends upon such factors as the degree of reprehensibility and the extent to which the State's interest in deterrence and punishment may be accomplished through means other than punitive damages. Taking these factors into account, the maximum in this case is "at or near the amount of compensatory damages" (*State Farm*, 538 U.S. at 429), and certainly no greater than four times the compensatory award.

ARGUMENT

I. THE OREGON COURTS DEPRIVED PHILIP MORRIS OF DUE PROCESS BY ALLOWING THE JURY TO IMPOSE PUNISHMENT FOR HARMS SUFFERED BY NON-PARTIES.

This Court has squarely held that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." *State Farm*, 538 U.S. at 423. That is because "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Ibid.* The Oregon courts' violation of this principle requires a new trial.

A. Due Process Precludes Punishment For Injuries Suffered By Persons Not Before The Court.

The Fourteenth Amendment bars States from depriving "any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV. It is well settled that a "decision to punish a tortfeasor by means of an exaction of exemplary damages" constitutes a "deprivation[] of * * * property." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 434-35 (1994). Accordingly, basic principles of procedural due process require States to employ such safeguards as are "necessary to ensure that punitive damages are not imposed in an arbitrary manner." *Id.* at 420. This requirement is not limited to the jury's assessment of punitive liability; it also extends to the determination of the *amount* of damages to be imposed. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 20 (1991) (State must employ procedures that produce a "meaningful individualized assessment of appropriate deterrence and retribution"); *Oberg*, 512 U.S. at 432 (procedural due process requires review of "the amount awarded").

Oregon has violated this constitutional command by embracing a procedure under which a defendant can be punished for harms to unidentified individuals who are not before the court (i) without any realistic opportunity to show that those unidentified non-parties might not have valid claims; (ii) without any protection against the filing of identical future claims for punitive damages by those unidentified non-parties; and (iii) with no consideration for cases the defendant may have won (or may win in the future) against those unidentified non-parties.

Thus, Oregon has embraced a procedure that affirmatively promotes excessive, duplicative punishment: a defendant may be punished multiple times for the harms that it allegedly imposed on hundreds or thousands of State residents, without regard to whether it could successfully defend against the claims of some or most of those residents. This procedure is a recipe for precisely the arbitrary deprivation of property against which the Due Process Clause is meant to protect.

1. A procedure that allows juries in individual cases to impose punishment for non-party harms does not adequately guard against, but rather invites, arbitrary deprivations of property.

Oregon's approach is fundamentally unfair in multiple respects. First, as this Court recognized in *State Farm*, the Oregon approach creates a substantial risk of "multiple punitive damages awards for the same conduct." 538 U.S. at 423. The judgment in this case will bind only plaintiff. Therefore, other Oregonians remain free to sue Philip Morris for smoking-related injuries, and to seek punitive damages for their injuries, even though the punitive award in this case may already punish for those harms. Insofar as any of those plaintiffs succeed, Philip Morris will be punished repeatedly for causing exactly the same injuries to exactly the same people.

Such an outcome is plainly unconstitutional. As this Court explained decades ago, an owner of property "is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again * * * in a suit brought by a claimant who is not bound by the first judgment." *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 75 (1961). The problem presented by repeated claims for money damages for the same injuries is no different. See *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1873) (describing "the maxim" in civil cases "that no man shall be twice vexed for one and the same cause"); see also *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) (invoking *State Farm* and making the same point in the punitive damages context).

Second, because the judgment in an individual case like this one is not binding on any potential claimant except the plaintiff, the Oregon approach exposes defendants to the risk that sooner or later they will be held liable for at least one aggregate punishment, no matter how many times they may have prevailed in similar cases. This regime fails to account for the possibility that, in these similar cases, other juries and courts might not find the defendant's conduct wrongful or might not find that it proximately caused the plaintiff's injury. See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 596 (2003). As the California Supreme Court recently put it in refusing to allow punishment for harms to non-parties, forcing defendants to play this high-stakes game of Russian roulette "present[s] a problem of 'successive prosecution' in which a defendant that loses a single case would also lose the benefit of all previous victories against the same claim of misconduct." *Johnson* v. *Ford Motor Co.*, 113 P.3d 82, 94-95 (Cal. 2005).

This problem is hardly hypothetical. Many Oregonians with smoking-related illnesses could not have proven a claim

for compensation, much less for punishment, had they brought their own suits. Indeed, in the more than 50-year history of smoking-and-health litigation, only two individual cases have ever gone to trial in Oregon:[2] the other claims were either voluntarily withdrawn, not pursued, or dismissed during motion practice. Nor is the small number of lawsuits in Oregon surprising. It is, after all, not unlawful to sell cigarettes, notwithstanding the known dangers; and people who smoke with awareness of the risks have no viable fraud claim. In part for this reason, Philip Morris has prevailed in a significant majority of the individual smoking-and-health cases that have ever gone to trial – including many cases that were brought on the same fraud theory presented by plaintiff here.[3]

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[2] The other case is *Estate of Schwarz* v. *Philip Morris, Inc.*, Case No. 0002 01376 (Or. Cir. Ct. Mar. 22, 2002).

[3] See, *e.g.*, *Karney* v. *Philip Morris Inc.*, Case No. 89196-8 (Tenn. Cir. Ct. May 10, 1999); *Hyde* v. *Philip Morris Inc.*, Case No. 97-359-ML (D.R.I. Mar. 21, 2001); *Carter* v. *Philip Morris Corp.*, Case No. 004567 (Pa. C.P. Jan. 27, 2003); *Lucier* v. *Philip Morris USA Inc.*, Case No. 312610 (Cal. Super. Ct. Feb. 7, 2003); *McDaniel* v. *Brown & Williamson Tobacco Corp.*, Case No. 90832T-8 (Tenn. Cir. Ct. May 10, 1999); *Butler* v. *Philip Morris Cos.*, Case No. 94-5-53 (Miss. Cir. Ct. June 2, 1999); *Reller* v. *Philip Morris USA Inc.*, Case No. BC261796 (Cal. Super. Ct. July 31, 2003); *Longden* v. *Philip Morris Inc.*, No. 2000-C-442 (N.H. Super. Ct. Nov. 24, 2003); *Reller* v. *Philip Morris USA Inc.*, BC261796 (Cal. Super. Ct. Mar. 4, 2005); *Coolidge* v. *Philip Morris Inc.*, No. RIC-361063 (Cal. Super. Ct. Apr. 21, 2005); *Beckum* v. *Philip Morris USA Inc.*, No. 02-01836-Div. D (Fla. Cir. Ct. Apr. 29, 2005); *Mehlman* v. *Philip Morris Inc.*, L-Case No. 1141-99(MT) (N.J. Super. Ct. May 16, 2001). Other tobacco companies likewise often prevail against similar claims. See *Anderson* v. *Fortune Brands Inc.*, Case No. 42821/97 (N.Y. Sup. Ct. June 27, 2000); *Apostolou* v. *American Tobacco Co.*, Case No. 34734/00 (N.Y. Sup. Ct. Jan. 16, 2001); *Tompkin* v. *Brown & Williamson Tobacco Corp.*, Civil Action No. 5:94 CV 1302 (N.D. Ohio Oct. 5,

Third, and relatedly, the Oregon approach cannot be squared with the basic due process right, recognized repeatedly by this Court, to "'an opportunity to present every available defense.'" *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)); see also *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) (a defendant's "right to litigate the issues raised" is "a right guaranteed to him by the Due Process Clause"); cf. *Holmes* v. *South Carolina*, 126 S. Ct. 1727, 1731 (2006) ("the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense") (internal quotation marks omitted). An essential component of this due process requirement is that a defendant have the opportunity to present its defenses and to cross-examine adverse witnesses. See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses"). A defendant might well have winning defenses against parties who are not before the court.[4] However, because those parties are not a part of the case, and often, as here, are not even identified, there is no meaningful opportu-

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2001); *Tune* v. *Brown & Williamson Tobacco Corp.*, Case No. 97-4678-CI-13 (Fla. Cir. Ct. May 24, 2002); *Conley* v. *R.J. Reynolds Tobacco Co.*, C-00-1740 SBA (N.D. Cal. Dec. 31, 2002); *Inzerilla* v. *American Tobacco Co.*, Case No. 011754/96 (N.Y. Sup. Ct. Feb. 20, 2003); *Allen* v. *R.J. Reynolds Tobacco Co.*, Case No. 01-4319-CIV-KING (S.D. Fla. Feb. 28, 2003); *Welch* v. *Brown & Williamson Tobacco Corp.*, Case No. 00-CV-209292 (Mo. Cir. Ct. June 17, 2003).

[4] In smoking-and-health litigation, for example, Philip Morris successfully defends itself on a number of grounds, including lack of reliance; failure to prove proximate causation; the applicable statute of limitations; comparative fault; preemption; and assumption of the risk.

nity to demonstrate, through cross-examination or otherwise, that they lack valid claims.

In this case, plaintiff's counsel introduced evidence of a handful of allegedly false public statements made by Philip Morris over a 46-year period. He then urged the jury to punish Philip Morris for harms to all Oregonians who may have developed lung cancer as a result of smoking its cigarettes – without identifying any of those people, much less offering evidence that they were affected by any fraud. See pp. 3-4, *supra*.

The Oregon Supreme Court basically accepted plaintiff's argument, holding that Philip Morris could properly be punished for injuries to the "broad[] class" of Oregonians who "kept buying cigarettes." Pet. App. 23a. There was no evidence, however, of (i) who these other Oregonians were; (ii) how many (if any) of them heard, relied on, and were injured by the allegedly fraudulent statements that Williams may have heard; or indeed (iii) how many of them had heard, relied on, and were injured by *any* alleged misrepresentations made by Philip Morris.

In other words, plaintiff was allowed to "portray[] [other Oregon smokers] as a large, unified group that suffered a uniform, collective injury," while Philip Morris was "forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation." *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (Wilkinson, C.J.). That would never be permitted in a valid class action in which the defendant's due process rights are safeguarded;[5]

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[5] See, *e.g.*, *Broussard*, 155 F.3d at 345; *Rollins, Inc.* v. *Butland*, __ So. 2d __, 2006 WL 1791705, at *10 (Fla. Dist. Ct. App. June 30, 2006) ("Although a trial court confronting a massive class action may find it tempting to allow proof of 'patterns' and 'common schemes' to paper over the dissimilarities attendant to individual claims, considerations of administrative convenience do not trump

it is even more improper here, where no class was or could have been certified.[6]

Finally, as we discuss below, it is well established that punitive damages must "bear a 'reasonable relationship' to compensatory damages" (*BMW*, 517 U.S. at 580). But plaintiffs in individual cases are not required to (i) prove the validity of anyone's claim other than their own or (ii) introduce evidence of the extent of the harm suffered by anyone other than themselves. Here, for example, there is no way to know

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the class action defendant's right to due process of law."); *Southwestern Ref. Co.* v. *Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) (because defendant is constitutionally "entitled to challenge the credibility of and its responsibility for each personal injury claim individually," certification of class of plaintiffs alleging personal injury arising out of refinery fire was improper).

[6] Virtually all courts that have addressed the issue have held that smoking-and-health cases cannot properly be certified as class actions because, among other reasons, the claims are highly individualized and the cases cannot satisfy the "predominance" and "superiority" requirements imposed by most jurisdictions. See, *e.g.*, *Barnes* v. *American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Estate of Mahoney* v. *R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150 (S.D. Iowa 2001); *Badillo* v. *American Tobacco Co.*, 202 F.R.D. 261 (D. Nev. 2001); *Chamberlain* v. *American Tobacco Co.*, 70 F. Supp. 2d 788 (N.D. Ohio 1997); *Clay* v. *American Tobacco Co.*, 188 F.R.D. 483 (S.D. Ill. 1999); *Insolia* v. *Philip Morris, Inc.*, 186 F.R.D. 535 (W.D. Wis. 1998); *Emig* v. *American Tobacco Co.*, 184 F.R.D. 379 (D. Kan. 1998); *Barreras Ruiz* v. *American Tobacco Co.*, 180 F.R.D. 194 (D.P.R. 1998); *Philip Morris, Inc.* v. *Angeletti*, 752 A.2d 200 (Md. 2000); *Small* v. *Lorillard Tobacco Co.*, 679 N.Y.S.2d 593 (N.Y. App. Div. 1998), aff'd, 720 N.E.2d 892 (N.Y. 1999); *Smith* v. *Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997). Certification of punitive damages classes in such cases also presents due process problems. See, *e.g.*, *In re Simon II Litig.*, 407 F.3d 125, 138 (2d Cir. 2005).

whether anyone other than Jesse Williams was deceived into continuing smoking and, if there were any such people, who among them contracted cancer or some other illness as a result. Accordingly, there is no way to know whether the $79.5 million penalty is excessive punishment for harms to similarly situated Oregonians. Nor is there any way to know in subsequent cases how many non-parties this punitive award was intended to punish for, who those non-parties are, and the cause and extent of their harms. Yet without that information, it is impossible to determine whether subsequent punitive awards are cumulative and hence per se excessive.

In sum, the procedure endorsed by the Oregon Supreme Court is a formula for arbitrary deprivations of property.

2. Historically, punitive damages have been limited to the plaintiff's harm.

Not only does punishment for harms to non-parties lead to serious and irremediable fairness problems, but it also lacks any historical pedigree. For almost the entirety of their existence, punitive damages were awarded only as punishment for harm to the specific person bringing the claim. Under this Court's precedents, Oregon's dramatic "departure from traditional procedures" (*Oberg*, 512 U.S. at 421) "raises a presumption that [Oregon's] procedures violate the Due Process Clause." *Id.* at 430.

Punitive damages first appeared in English common law in the 18th century. At that time, there was no clear line between compensatory and punitive damages. See *Louis Pizitz Dry Goods Co.* v. *Yeldell*, 274 U.S. 112, 116 (1927) ("The distinction between punitive and compensatory damages is a modern refinement."). The concept of punitive or exemplary damages was initially used as a means of explaining and justifying damages awards that were in excess of a plaintiff's tangible harm. *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 438 n.11 (2001).

Throughout the second half of the 19th century, courts and commentators were sharply divided over whether damages could ever properly be imposed for purposes of punishment. See *Haslip*, 499 U.S. at 25-27 (Scalia, J., concurring). *Compare* Simon Greenleaf, A TREATISE ON THE LAW OF EVIDENCE 240-50 (16th ed. 1899) (exemplary damages represent compensation for intangible or dignitary harm) and *Fay* v. *Parker*, 53 N.H. 342, 1872 WL 4394, at *40 (1872) (same) *with* Theodore Sedgwick, TREATISE ON THE MEASURE OF DAMAGES 36 (3d ed. 1858) (punitive damages "blend[] together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender").

Courts gradually began to accept that damages could be imposed to punish as well as compensate. As modern punitive damages law continued to evolve, however, the "notion[] of punishing * * * remained centered throughout on the insult or injury to the plaintiff." Colby, *supra*, 87 MINN. L. REV. at 619. A single act could, of course, harm more than one person, but courts recognized that the punishment in a given suit was for the distinct harm to the party before the court. See, *e.g.*, *Stevenson* v. *Belknap*, 6 Iowa 97, 1858 WL 120 (1858), at *3 (In calculating exemplary damages for a wrong that has harmed more than one party, "proof will be confined, in each case, to the damages resulting to the plaintiff alone, and not to another; nor to the plaintiff jointly with another."); see also Colby, *supra*, 87 MINN. L. REV. at 623 (explaining that, when a defendant's conduct injured more than one person, courts allowed the defendant to be punished more than once "because each award serve[d] as punishment only for the legal wrong that [was] actually before the court – the wrong done to the individual plaintiff").

On the rare occasions when they confronted the problem of punishing for harms to non-parties, 19th-century courts consistently rejected the idea that punitive damages could be used to vindicate the injuries of persons who were not parties

to the particular case. As early as 1874, the Michigan Supreme Court declared:

> The foundation of exemplary damages * * * rests on the wrong done willfully to the complaining party, and not to wrong done without reference to that party. Otherwise, every one entitled under the statute to bring an action might bring his or her separate action for the same wrong, and while each would recover as his own actual damages no more than his own injury, the same exemplary damages would be multiplied and recoverable in addition to actual damages in every one of those actions.

Ganssly v. *Perkins*, 30 Mich. 492, 1874 WL 6449, at * 2 (1874).[7]

The general consensus that punitive damages may be imposed only to punish for the harm to the party before the court is reflected as well in the debate among 19th-century courts as to whether punitive damages violate the Double Jeopardy Clause. Several courts held that civil punitive damages could not be imposed where the defendant might be subject to criminal liability for the same act, because a contrary rule would violate the principle "that each violation of the law should be certainly followed by one appropriate punishment and no more." *Taber* v. *Hutson*, 5 Ind. 322, 1854 WL 3361, at *2 (1854); see also Sedgwick, TREATISE ON THE MEASURE OF DAMAGES, *supra*, at 478 n.2. By contrast, courts allowing both civil and criminal punishments did so on the ground that civil punitive damages punish for harm to the individual before the court and not for societal harm, which is vindicated through the criminal justice system. See, *e.g.*, *Chiles* v. *Drake*, 2 Met. 146, 1859 WL 5567, at * 5 (Ky. 1859).

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[7] We direct the Court to the *amicus curiae* brief filed by the American Tort Reform Association for additional examples.

Ultimately, the latter view – that punitive damages do not run afoul of the Double Jeopardy Clause – prevailed.[8] But what is important for present purposes is the common ground in this debate: both sides rejected any notion that multiple punitive awards could be imposed for the same harms to the *same* parties – which is the inevitable result of allowing punishment for harm to parties who are not before the court and hence are not bound by the court's judgment.

Once the double jeopardy question had been settled, issues regarding the propriety of punishing for harms to nonparties did not arise regularly until the late 1960s, with the advent of mass tort litigation. As Judge Friendly observed – in one of the first decisions to consider the "destructive synergism between traditional punitive damages doctrine and modern mass tort litigation" (John C. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 141 (1986)) – punitive damages historically had arisen in intentional tort cases, in which "usually there is but a single victim; a punitive recovery by him ends the matter, except for such additional liability as may be provided by the criminal law." *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 838 (2d Cir. 1967).

As a result of mass tort litigation, however, "punitive damages may [now] be repetitively invoked against a single course of conduct in unfair and potentially ruinous aggregation." Jeffries, *supra*, 72 VA. L. REV. at 139, 141-43. And as *State Farm* and this case reflect, plaintiffs' lawyers increasingly have exhorted juries in such cases to punish the defendant for the harms suffered by everyone purportedly injured by the defendant's conduct, not just the plaintiff. As the foregoing discussion confirms, this constitutes a marked de-

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[8] See, *e.g.*, *Fry* v. *Bennett*, 1 Abb. Pr. 289, 1855 WL 6398, at *12-*13 (N.Y. Sup. 1855) (Hoffman, J., concurring); *Baldwin* v. *Fries*, 46 Mo. App. 288, 296, 1891 WL 1541 (1891); *Brown* v. *Swineford*, 44 Wis. 282, 1878 WL 3236, at *3 (1878).

parture from historical practice, and thus raises a presumption of unconstitutionality. *Oberg*, 512 U.S. at 430.

B. The Oregon Supreme Court's Rationales For Allowing Punishment For Harms To Non-Parties Are Unsound.

The Oregon Supreme Court offered two principal reasons for rejecting Philip Morris's contention that a jury in an individual case may not constitutionally punish a defendant for harms suffered by non-parties. First, the court opined that *State Farm*'s condemnation of punishment for harm to non-parties was limited to harm arising from *dissimilar* conduct. Pet. App. 19a-20a. Second, the Oregon court found it "unclear" "how a jury could 'consider' harms to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.* at 18a n.3. Neither rationale is valid.

1. This Court has already foreclosed the Oregon Supreme Court's first rationale. The paragraph in *State Farm* to which the Oregon court referred mentions the impropriety of punishing for dissimilar conduct, but then goes on to hold that punishing for harm to non-parties impermissibly "creates the possibility of multiple punitive damages awards *for the same conduct*." 538 U.S. at 423 (emphasis added). The emphasized words should be the end of the matter. But beyond that, the fairness problems identified by the Court – as well as those we describe above, such as the risk of punishment for harms to persons who lack valid claims against the defendant – apply equally whether the alleged non-party harms arise from similar or dissimilar conduct.

2. As for the Oregon Supreme Court's confusion as to how a jury may consider harms to non-parties for purposes of assessing reprehensibility without imposing punishment on that basis, this Court has already drawn that distinction in the context of harms to non-parties who happen to live outside

the forum state. In *BMW*, the Court explained that, although the jury could not "use the number of sales in other States as a multiplier in computing the amount of its punitive sanction," the "evidence describing out-of-state transactions * * * may be relevant to the determination of the degree of reprehensibility of the defendant's conduct." 517 U.S. at 574 n.21. That observation applies equally here.

The same distinction also has long been recognized in criminal sentencing: a criminal defendant's entire course of conduct may be relevant in determining where, within a permissible range of potential sentences, the penalty for the particular conviction should fall. Thus, evidence of harm to others may be relevant and admissible to show the reprehensibility of the specific conduct at issue, and may support a higher penalty within a confined range, but the defendant cannot be *punished* for anything other than the offense of conviction. See, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 154 (1997) ("sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction").[9]

Of course, it may sometimes be difficult to tell in retrospect whether a jury impermissibly punished a defendant for harms to non-parties rather than merely taking those harms into account in gauging the reprehensibility of the defendant's conduct toward the plaintiff. No such difficulty exists here, however, given that (i) plaintiff's counsel expressly exhorted the jury to punish for smoking-related harms suffered

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[9] See also *Witte* v. *United States*, 515 U.S. 389, 401-03 (1995) ("[C]onsideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." Rather, the defendant is "punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment * * *.") (emphasis in original).

by other Oregonians; (ii) the court refused Philip Morris's proposed jury instruction on this issue; and (iii) the jury responded by returning a verdict of nearly 100 times the compensatory damages. In any event, to the extent that this distinction is one that might be elusive to a jury, that is a reason to give a clearly-worded limiting instruction – not a reason to ignore the constitutional requirement.

C. Philip Morris Had A Due Process Right To An Instruction Prohibiting Punishment For Harms To Non-Parties, Or Some Equivalent Protection.

If a jury in an individual case may not constitutionally punish for harms to non-parties, it follows that the Due Process Clause entitled Philip Morris to an instruction informing the jury of that limitation on its powers. Indeed, an instruction was especially necessary here because plaintiff's counsel expressly urged the jury to punish for harms to non-parties. See pp. 3-4, *supra*.

State Farm effectively decides this point, recognizing that a limiting instruction is required to protect a defendant from a due process violation closely akin to the one involved here. Specifically, after observing that evidence of lawful out-of-state conduct may be relevant to "the deliberateness and culpability of the defendant's action in the State where it is tortious," the Court admonished that "[a] jury must be instructed * * * that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." 538 U.S. at 422. The instruction at issue here is indistinguishable in all material respects from the one this Court required in *State Farm*.

Moreover, for more than a century, courts have given a limiting instruction of this sort to protect parties against the prejudicial impact of evidence that is admissible for one purpose but inadmissible for another. In the first edition of his evidence treatise, for example, Wigmore declared it "uniformly conceded" that a party against whom evidence was

admissible only for a limited purpose had a right to a limiting instruction so that the evidence would not be misused by the jury. 1A John H. Wigmore, TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 13, at 42 (1904). This Court, too, long ago recognized the limiting instruction as an essential safeguard. See, *e.g.*, *Winchester & Partridge Mfg. Co.* v. *Creary*, 116 U.S. 161, 166 (1885) (limiting instruction necessary if otherwise inadmissible testimony is permitted for impeachment purposes).

The giving of a simple limiting instruction, a routine feature of jury trials across the nation, would have imposed no burden on the Oregon courts, would have trenched upon no right of the plaintiff, and would have dramatically reduced the risk of an erroneous deprivation of property in this case. Plaintiff had no valid interest in resisting it.[10]

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[10] The instruction requested by Philip Morris would have informed the jury both that it could not punish Philip Morris for harms to non-parties and that its punitive award had to be reasonably related to plaintiff's compensatory damages. As we explain below (at 28-29), a central function of the reasonable-relationship requirement is to constrain the jury's ability to punish for harm to non-parties.

Moreover, plaintiff's counsel took advantage of the absence of such an instruction by telling the jury that the only two relevant figures were (i) the $100 million that the trial court had identified as the maximum permissible award and (ii) Philip Morris's net worth:

> In terms of what $100 million, which is the ceiling above, which you cannot go in this case, bears as a ratio to the net worth of Philip Morris is a dime to a figure of $17. Or one-tenth of a dollar to $17.
>
> That is the ratio of the punitive damage claim in this case.

J.A.198a. The refusal to instruct the jury about the reasonable-relationship requirement was thus highly prejudicial.

There can be little doubt that the refusal to give this critical instruction was highly prejudicial: plaintiff was permitted to argue for a punitive award that punished for harms suffered by other Oregonians, and the jury responded with a penalty of nearly 100 times plaintiff's compensatory damages. A new trial is the only adequate remedy.[11]

II. THE $79.5 MILLION PUNITIVE AWARD IS UNCONSTITUTIONALLY EXCESSIVE.

A. The Oregon Supreme Court Erred In Holding That The Ratio Guidepost Can Be "Overridden" By The Other Two Guideposts.

1. The *BMW* guideposts protect against arbitrary deprivations of property.

It is by now well established that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416.[12] This protection is

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[11] Remittitur would be a wholly inadequate remedy for the due process violation that occurred here. In Oregon, as in most jurisdictions, excessive awards are remitted only to the *greatest* amount a jury could lawfully have awarded. *Parrott* v. *Carr Chevrolet Inc.*, 17 P.3d 473, 485 (Or. 2001). But a properly instructed jury here might have awarded far less than that maximum. Accordingly, only a new trial can rectify the constitutional violation. See *White* v. *Ford Motor Co.*, 312 F.3d 998, 1021 (9th Cir. 2002); cf. *Hicks* v. *Oklahoma*, 447 U.S. 343, 346 (1980) (upon determining that jury had been misinstructed and had therefore predicated verdict on an unconstitutional basis, state court could not simply substitute the maximum penalty that a properly instructed jury "*might* have imposed") (emphasis in original).

[12] See also *Cooper Indus.*, 532 U.S. at 434; *BMW*, 517 U.S. at 562; *Oberg*, 512 U.S. at 420; *TXO Prod. Corp.* v. *Alliance Res. Group*, 509 U.S. 443, 456 (1993) (plurality op.); *Haslip*, 499 U.S. at 21-22.

deeply rooted in our law, going back at least a century. See, *e.g.*, *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U.S. 86, 111 (1909) ("grossly excessive [civil penalties] amount to a deprivation of property without due process of law"). And the underlying principle "harken[s] back to the Magna Carta." *BMW*, 517 U.S. at 587 (Breyer, J., concurring).

This Court's punitive damages precedents are predicated on "the constitutional importance of legal standards that provide 'reasonable constraints' within which 'discretion is exercised.'" *BMW*, 517 U.S. at 587 (Breyer, J., concurring) (quoting *Haslip*, 499 U.S. at 20-21). These constraints are necessary to ensure "'meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages,' and permit 'appellate review that makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'" *Ibid.* In the absence of such "reasonable constraints," there is "a substantial risk of outcomes so arbitrary that they become difficult to square with the Constitution's assurance, to every citizen, of the law's protection[.]" *Id.* at 596.

The need for such constraints is particularly acute in the area of punitive damages because, "[a]though these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm*, 538 U.S. at 417. Moreover, unlike in the criminal context, in which maximum sentences and/or fines for different types of conduct are legislatively determined, in most states punitive awards are open-ended, "leav[ing] the jury with wide discretion in choosing amounts." *Ibid.* Indeed, although juries have little expertise in setting punishment and therefore lack an appropriate frame of reference,[13]

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[13] See, *e.g.*, W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 329 (2001).

jury instructions often provide them with little guidance other than "to do what they think is best." *Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

In view of these concerns about the risks of arbitrary and excessive punishment, the Court in *BMW* set forth three guideposts for reviewing punitive awards for excessiveness: the degree of reprehensibility of the defendant's conduct, the ratio of punitive to compensatory damages, and any legislative or administrative penalties for comparable misconduct. 517 U.S. at 574-85; see also *State Farm*, 538 U.S. at 418.

As the Court's opinions in *BMW* and *State Farm* explain, each of these guideposts performs a distinct role in the analysis. The reprehensibility guidepost ensures that the greater wrong receives the more severe punishment. The reasonable-relationship requirement ensures that the punishment is proportionate to the harm caused by the punishable misconduct. And the comparable penalties guidepost, where applicable, helps to enforce the due process notice requirement and to account for legislative and administrative determinations of proper punishment levels for the conduct at issue. See, *e.g.*, *State Farm*, 538 U.S. at 419-28; *BMW*, 517 U.S. at 575-85.

The Oregon Supreme Court jettisoned one of the guideposts – the reasonable-relationship requirement. Acknowledging that "the second *Gore* guidepost is not met" here (Pet. App. 31a), the court nonetheless upheld the massively disproportionate punitive award on the ground that "the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may arise from a double-digit ratio" (*id.* at 33a). Thus, the court effectively held that, where the evidence permits a finding of extreme reprehensibility, the defendant forfeits the right to proportionate punishment.

That proposition fundamentally conflicts with this Court's jurisprudence, which has consistently stressed "the importance of the[] *three* guideposts" in preventing excessive punitive awards. *State Farm*, 538 U.S. at 418 (emphasis added). In particular, this Court has foreclosed the Oregon Supreme Court's notion that the ratio guidepost – and with it, the proportionality requirement – can be disregarded in any case. Each guidepost "must be implemented with care, to ensure both reasonableness and proportionality." *Id.* at 428. Thus, even where a defendant's conduct is "reprehensible" (*id.* at 419-20) and "merits no praise" (*id.* at 419), the punitive award still must be proportionate both "to the amount of harm to the plaintiff and to the general damages recovered." *Id.* at 426.

2. The reasonable-relationship requirement serves critical functions that are not performed by the other two guideposts.

The ratio of punitive to compensatory damages "has a long pedigree" as a factor in gauging excessiveness; it is "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award." *BMW*, 517 U.S. at 580.[14] The reasonable-relationship requirement addresses fundamental interests and concerns that are critical to the excessiveness inquiry, but that are not protected by the other two guideposts.

i. ***Proportionality.*** Although, as discussed above, due process requires that the jury be instructed not to punish for harms to non-parties, that safeguard is not always sufficient protection against verdicts that implicate the concerns discussed in Point I.A.1, *supra*. Post-verdict review provides a

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[14] See also *BMW*, 580 U.S. at 581 (all of this Court's punitive damages decisions have "endorse[d] the proposition that a comparison between the compensatory award and the punitive award is significant").

second indispensable check. *Oberg*, 512 U.S. at 432. And among the three guideposts that courts apply when conducting post-verdict review, only the ratio guidepost helps to ensure that a punitive damages judgment is not excessive as a result of a jury's intention to punish for harms to non-parties.

By ensuring proportionality, the ratio guidepost acts as a firewall on aberrational verdicts by ensuring that each jury is limited to adjudicating the case before it: no single jury is given the power to override defense judgments in other, similar cases by punishing for all injuries arising from a single course of conduct.

ii. ***Objectivity.*** This Court has emphasized the importance of procedures that "'assure the uniform general treatment of similarly situated persons that is the essence of law itself.'" *Cooper Inaus.*, 532 U.S. at 436 (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)). As the most objective of the three guideposts, the ratio of punitive to compensatory damages is essential to this critical function. Only the ratio guidepost provides a concrete benchmark by which the punishment in a particular case can be compared with punishments in other cases.[15] And only the ratio guidepost ensures that the relationship between the punishment and the harm inflicted falls within a traditionally-accepted range. See, *e.g.*, *State Farm*, 538 U.S. at 425, 427; *BMW*, 517 U.S. at 580-81. If the ratio guidepost could be ignored whenever a jury "could have found" extreme reprehensibility, the constitu-

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[15] See, *e.g.*, Andrew C. W. Lund, *The Road from Nowhere? Punitive Damage Ratios After* BMW *v.* Gore *and* State Farm Mutual Automobile Insurance Co. *v.* Campbell, 20 TOURO L. REV. 943, 973-84 (2005) (discussing the ratio guidepost's role in ensuring "non-arbitrariness"); Mark A. Klugheit, "*Where the Rubber Meets the Road:" Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803, 833 (2002) ("Whereas reprehensibility is an elusive concept, ratio (at least between actual compensatory and punitive awards) is not.").

tional limitations on punishment would mean little, especially in the very cases – those in which the defendant is unpopular or its conduct is likely to evoke strong emotion – where those restraints are most needed. Cf. *State Farm*, 528 U.S. at 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

Although the reprehensibility guidepost also plays a critical role in excessiveness review, it cannot substitute for the ratio guidepost, because the reprehensibility guidepost is inherently subjective.[16] To appreciate the subjective nature of the reprehensibility guidepost, this Court need look no further than the remand proceedings in *State Farm* itself. This Court determined that State Farm's conduct was "reprehensible" (*id.* at 420), but expressly rejected each of the bases for the Utah courts' belief that the conduct was *especially* so (*id.* at 420-24). On remand, however, the Utah Supreme Court concluded that "the blameworthiness of State Farm's behavior toward the Campbells [was] several degrees more offensive than the Supreme Court's less than condemnatory view [of the misconduct]." *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 413 (Utah), cert. denied, 543 U.S. 874 (2004). Accordingly, it rejected this Court's suggestion that a $1 million punishment (a 1:1 ratio) was "at or near" the constitutional maximum, instead setting the punitive dam-

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[16] As Justice Breyer observed in *BMW*, "neither clear legal principles nor fairly obvious historical or community-based standards []defin[e] * * * especially egregious behavior." 517 U.S. at 596. In addition, "little guidance [historically exists] on how to relate culpability to the size of an award." *Id.* at 590 (Breyer, J., concurring); see also Richard W. Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 WASH. L. REV. 995, 1013 (2001) ("even if various juries were similarly outraged by similar bad acts, we could not expect these juries to transmute their outrage into dollars in a way that ensures similar punishment for similar defendants").

ages at a 9:1 multiple of compensatory damages, which was the highest ratio it believed to be available after this Court's decision. *Id.* at 412.[17]

It is no answer to say that the Oregon Supreme Court purported to restrict the circumstances under which the reasonable-relationship requirement may be "overridden" to instances of "extraordinarily" egregious misconduct. Pet. App. 33a. That is no restriction at all. The lower courts have routinely placed that or a similar label on conduct that barely qualified as punishable.[18]

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[17] *State Farm* is no by means unique in this regard. Since *State Farm*, the lower courts have often reached divergent reprehensibility assessments on analogous facts. For instance, the Ninth Circuit has found the failure to prevent or respond appropriately to discrimination to be especially reprehensible, while several state courts have reached different conclusions. Compare *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1043 (9th Cir. 2003), *Bains LLC* v. *Arco Prods. Co.*, 405 F.3d 764, 777 (9th Cir. 2005), and *Southern Union Co.* v. *Southwest Gas Corp.*, 415 F.3d 1001, 1101 (9th Cir. 2005) ("high punitives" are warranted in cases involving racial, gender, or religious discrimination), with *Gober* v. *Ralphs Grocery Co.*, 137 Cal. App. 4th 204, 219-20 (2006) (discrimination on the basis of gender evinced only a "modest degree of reprehensibility" and did not warrant large punitive award), and *Czarnik* v. *Illumina, Inc.*, 2004 WL 2757571, at *10 (Cal. Ct. App. Dec. 3, 2004) (discrimination on the basis of disability was "not highly reprehensible" and did not warrant large award).

[18] See, *e.g.*, *Robbins* v. *Saunders*, 927 So. 2d 777, 779, 791 (Ala. 2005) (majority shareholder engaged in "extremely reprehensible" misconduct when it "oppress[ed]" and "squeeze[d]-out" minority shareholders and failed to pay them funds to which they were entitled); *Casciola* v. *F.S. Air Serv., Inc.*, 120 P.3d 1059 (Alaska 2005) (failure to either deliver jet engine as promised or return the deposit was "extremely reprehensible"); *Spunberg* v. *Columbia/JFK Med. Ctr. Ltd. P'ship*, 1999 WL 1256428, at *9 (Fla. Cir. Ct. May

Like the reprehensibility guidepost, the comparable fines guidepost can have a meaningful role to play "as another measure that restrains the permissible amount" of punitive damages (*Bains LLC* v. *Arco Prods. Co.*, 405 F.3d 764, 777 (9th Cir. 2005)). It is particularly useful for that purpose when (i) the legislatively established penalty is imposed on a regular and predictable basis, and (ii) the conduct at issue in the case is clearly the type of conduct for which the penalty was designed. See, *e.g.*, *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 607-08 (6th Cir. 2006) ($3 million punitive award in automobile design-defect case was excessive in relation to the statutory penalty for selling defective vehicles). While this guidepost may be "objective" on the surface, the Oregon Supreme Court's treatment of it, discussed further below (see pp. 43-44, *infra*), shows how susceptible the inquiry is to manipulation when these circumstances are not present.

iii. ***Deterrence.*** The ratio guidepost also takes into account the extent of the State's interest in punishment and deterrence. As a matter of due process, a punitive award cannot exceed the amount that serves those interests.[19] When compensatory damages are substantial, they already impart substantial deterrence, and when they are nominal or small (for example, in many of the early punitive damages cases), they may well be insufficient to deter. For these reasons, the permissible ratio of punitive to compensatory damages diminishes as compensatory damages increase. See *State Farm*,

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28, 1999) (defendants' tortious interference with business relationship was "extremely egregious and reprehensible").

[19] See *State Farm*, 538 U.S. at 419-20 ("[A] more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and Utah courts should have gone no further."); see also *BMW*, 517 U.S. at 584 ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.").

538 U.S. at 425-26.[20] Neither the reprehensibility guidepost nor the comparable penalties analysis takes into account the size of the compensatory damages or other factors – such as whether the defendant has already been subjected to other significant consequences for its conduct – that may reduce (or increase) the need for deterrence.

B. Nothing More Than A Low Single-Digit Multiple Can Satisfy Due Process In This Case.

It is clear that the Oregon Supreme Court erred in disregarding the ratio guidepost and upholding a 97:1 ratio of punitive to compensatory damages. It remains to determine what ratio would be within constitutional bounds.

1. This Court has established a framework in which low-single-digit ratios are the norm.

In *Haslip*, where the compensatory damages were approximately $200,000 and the conduct involved a fraud on a vulnerable victim, the Court observed that a ratio of 4:1 was "close to the line" of constitutionality. 499 U.S. at 23-24. In *TXO Production Corp.* v. *Alliance Resources Group*, 509 U.S. 443 (1993), a plurality of the Court upheld a ratio of punitive damages to potential harm that was "not more than 10 to 1" and likely somewhere in the range of 2.5:1 to 5:1. *BMW*, 517 U.S. at 581 & n.34. In *BMW*, the Court invoked the dozens of early English statutes providing for double, treble, and quadruple damages as evidence of the "long pedigree" of the reasonable-relationship requirement. *Id.* at 580-81. And in *State Farm*, the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages * * * will satisfy due process"; reiterated that a punitive award of four times compensatory damages was

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[20] See also *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-07 (1986) ("Punitive damages aside, * * * [d]eterrence * * * operates through the mechanism of damages that are *compensatory*.") (emphasis in original).

likely to "be close to the line of constitutional impropriety"; and indicated that, though it is "not binding," the 700-year-long history of double, treble, and quadruple damages remedies is "instructive." 538 U.S. at 425.

State Farm indicates that a higher multiple may be permissible when (i) "a particularly egregious act has resulted in only a small amount of economic damages"; (ii) "the injury is hard to detect"; or (iii) "the monetary value of non-economic harm might have been difficult to determine." 538 U.S. at 425. At the same time, the Court also identified several factors that drive down the maximum permissible ratio. For example, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. And a lower ratio may be required when the compensatory damages "already contain [a] punitive element," such as damages for emotional distress. *Id.* at 426.[21]

What emerges from *State Farm* is a framework under which the constitutional maximum punishment in any particular case is a function primarily (but not exclusively) of two variables: the amount of compensatory damages and the degree of reprehensibility of the conduct. If the compensatory damages are substantial, the permissible punishment will range from zero to a multiple of four times the compensatory damages. The precise maximum within that range in any particular case would turn on the degree of reprehensibility

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[21] This list is not exclusive. A lower ratio might also be warranted if the defendant is subject to close regulatory oversight or has incurred other financial burdens, such as settlement payments, remediation costs, and awards of attorneys' fees, all of which provide substantial deterrence in their own right. See, *e.g.*, *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) (clean-up costs, settlements with non-parties, fines, and restitution all have a deterrent effect).

of the conduct, the existence of truly comparable legislative or administrative penalties, and the extent to which the State's interest in deterrence and punishment may be accomplished through means other than punitive damages. If the compensatory damages are not substantial, a ratio of between 4:1 and 10:1 may be permissible depending on how reprehensible the conduct is determined to be. But only if the compensatory damages are truly small and the conduct is highly egregious is a double-digit ratio constitutionally permissible.

2. This framework is drawn from, and consistent with, historical practice.

The guidance that this Court provided in *State Farm* was drawn from several centuries of Anglo-American legal history, throughout which low-single-digit ratios of punitive to compensatory damages have always been the norm. As this Court signaled in *State Farm*, such multiples should represent the outer limit in most cases today as well.

In reviewing the origins of punitive damages, this Court pointed to "early English statutes authorizing the award of multiple damages for particular wrongs. * * * Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages" – *i.e.*, ratios of 1:1, 2:1, and 3:1. *BMW*, 517 U.S. at 580-581 & n.33 (citing David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363, 368 & n.23 (1994)); see also 2 Frederick Pollock & Frederic Maitland, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 522 (2d ed. 1899) ("under Edward I, a favourite device of [English] legislators [was] that of giving double or treble damages to 'the party grieved'").[22]

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[22] As noted in *BMW*, many present-day federal statutes also provide double or treble damages. 517 U.S. at 581 n.33.

Low multiples remained the standard throughout early American history. "Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all." Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOKLYN L. REV. 1003, 1008 (1999).[23] Indeed, in 1915 the Pennsylvania Supreme Court ordered a new trial on punitive damages where the punitive award was 2.7 times the compensatory damages, stating that "[w]e know of no case in our own state where punitive damages were allowed in almost treble the amount of the actual damage sustained." *Rider* v. *York Haven Water & Power Co.*, 95 A. 803, 806 (Pa. 1915).

Similarly, in 1918 West Virginia's highest court struck down a $5,000 punitive award for trespass where actual damages were $557.50, stating that "we cannot allow a [punitive damages] verdict to stand where the amount thereof is so disproportionate to the amount of actual damages, is so out of harmony with the theory upon which punishments are inflicted for like offenses, that it convinces us that the jury were misguided, to say the least, in returning the same." *Pendleton* v. *Norfolk & W. Ry.*, 95 S.E. 941, 944 (W. Va. 1918). As the court explained:

> Upon this question of the measurement of punitive damages we have some statutes allowing a recovery of double damages or treble damages where a trespass is committed wantonly or maliciously, and

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[23] See, *e.g.*, *Garland* v. *Wholeham*, 26 Iowa 185, 1868 WL 310 (1868) ($1700 in total damages where harm was $1020); *Garland* v. *Wholebau*, 20 Iowa 271, 1866 WL 160 (1866) ($500 compensatory damages; $200 exemplary damages); *Lynd* v. *Picket*, 7 Minn. 184, 1862 WL 1259 (1862) ($267 compensatory damages; $168.59 exemplary damages); *Tifft* v. *Culver*, 3 Hill 180 (N.Y. 1842) ($3.37 compensatory damages; $2.52 exemplary damages); *Wort* v. *Jenkins*, 14 Johns. 352 (N.Y. 1817) ($75 verdict for beating to death a horse worth $50 or $60).

> while we do not mean to say that these statutes furnish an infallible guide to be followed in the ascertainment of punitive damages in a case like this, still they are an indication of public policy as ascertained and declared by the legislative body in this regard, and the analogy existing between the damages awarded under such statutes and the damages sought under the claim of punitive damages in cases like this make them a guide which cannot well be disregarded when a verdict of this character is challenged on the ground of excessiveness.

Ibid.[24]

To be sure, courts on occasion did uphold punitive awards that were higher multiples of compensatory damages. Most such decisions, however, fell into one of three categories: (i) the compensatory damages were small (*e.g.*, *White* v. *Metropolitan St. Ry. Co.*, 112 S.W. 278 (Mo. Ct. App. 1908)); (ii) there was uncompensated potential harm to the

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[24] See also *Flannery* v. *Baltimore & O.R.R. Co.*, 15 D.C. 111, 125, 1885 WL 18352 (1885) (9:1 ratio was excessive; remitting award to 2:1); *Buford* v. *Hopewell*, 131 S.W. 502 (Ky. Ct. App. 1910) (ordering new trial where ratio was 2:1); *Hunter* v. *Kansas City Rys.*, 248 S.W. 998, 1002-1003 (Mo. Ct. App. 1923) (5:1 ratio excessive; reducing award to 3:1); *Mitchell* v. *Randal*, 137 A. 171, 172 (Pa. 1927) (citing *Rider* and holding that 5:1 ratio was excessive); *Int'l & G.N.R.. Co.* v. *Telephone & Tel. Co.*, 5 S.W. 517, 518-19 (Tex. 1887) (50:1 ratio was excessive); *Texas Land & Cattle Co.* v. *Nations*, 63 S.W. 915, 916 (Tex. Civ. App. 1901) (9:1 ratio was excessive); *P.J. Willis & Bro.* v. *McNeill*, 57 Tex. 465, 480, 1882 WL 9534 (1882) (12:1 ratio was excessive). See generally Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 530 (1957) ("Many courts have found a way to limit the jury's wide discretion by requiring some 'reasonable relationship' between actual and exemplary damages.'"). We direct the Court to the *amicus curiae* brief of the American Tort Reform Association for additional examples.

plaintiff that far exceeded the plaintiff's actual harm (*e.g.*, *Livesey* v. *Stock*, 281 P. 70 (Cal. 1929)); or (iii) the punitive award represented compensation for forms of non-economic harm that are included in modern compensatory awards. See p. 17, *supra*.[25]

The view that punitive damages generally should be limited to a modest single-digit multiple of the compensatory award persisted through the 19th century and much of the 20th. In fact, as late as the 1960s "punitive damages awards were 'rarely assessed' and usually 'small in amount.'" *TXO*, 509 U.S. at 500 (O'Connor, J., dissenting) (citing Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982)). As Professor Owen observed in 1982, even "in serious injury or death cases," "the ratio of punitive to compensatory damages approved on appeal * * * only rarely has exceeded 1.5 or 2:1." David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 48 & n.224 (1982).

Astronomical punitive damages awards yielding multi-digit ratios are a phenomenon that has emerged only recently.[26] Such awards have no basis in common-law history. This trend is self-perpetuating: after reading news story after news story about seven-, eight-, and nine-figure awards, jurors become desensitized to large figures. The system of

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[25] See also Note, *supra*, 70 HARV. L. REV. at 520; 1 Jerome H. Nates et al., DAMAGES IN TORT ACTIONS § 3.01[3][a] (2000)); Colby, *supra*, 87 MINN. L. REV. at 617 & n.119 (2003) (discussing "the compensatory roots of punitive damages" and citing sources).

[26] See W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405, 1412 (2004) (examining punitive awards of over $100 million and concluding that, of the 64 such awards by April 2004, "[j]ust over half * * * [were issued] from 1999 to 2003" with "[m]any of the remainder [from] 1994 to 1998").

awarding punitive damages has broken down, and it routinely results in arbitrary and excessive punishment.

3. Application of the *State Farm* framework in this case mandates that the constitutional maximum is at or near the amount of compensatory damages.

In light of the guidance that this Court provided in *State Farm*, there can be no question that the $79.5 million punitive award is unconstitutionally excessive. Under *State Farm*, there is no justification for a 97:1 ratio when the compensatory damages are not "small" – *even if* the conduct at issue is deemed to be highly reprehensible. The maximum ratio in this case falls within the range that this Court has indicated will be the norm – up to 4:1 – and several factors counsel in favor of a ratio toward the lower end of that range.

As discussed above, when the compensatory damages are "substantial," the maximum permissible ratio is generally 4:1. Here, the $821,485 in compensatory damages are substantial. Indeed, the fact that they exceeded Oregon's cap by $300,000 confirms that.

The next question is where within the applicable range this case falls. For several reasons, the maximum punishment in this case is "at or near the amount of compensatory damages." *State Farm*, 538 U.S. at 429.

First, a substantial punishment is not needed to advance the interests of punishment and deterrence. The promotional activities of tobacco companies have been closely monitored and regulated for years by Congress and the Federal Trade Commission. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000) ("Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965."); *id.* at 144 ("Congress has created a distinct regulatory scheme to address the problem of tobacco and health * * *."); *Lorillard Tobacco Co.* v. *Reilly*,

533 U.S. 525, 541-45 (2001) (describing history of federal regulation of tobacco products); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 513-16 (1992) (same).

Moreover, as the Court is aware, Philip Morris has entered into settlements with all 50 States, including a Master Settlement Agreement ("MSA") with 46 States, including Oregon. These agreements provide for billions of dollars in settlement payments, contain rigorous injunctive and enforcement provisions, and require oversight by the State Attorneys General, including Oregon's. See, *e.g.*, *Reilly*, 533 U.S. at 533 ("In November 1998, Massachusetts, along with over 40 other States, reached a landmark agreement with major manufacturers in the cigarette industry. The signatory States settled their claims against these companies in exchange for monetary payments and permanent injunctive relief."). The combination of federal and state oversight and the terms of the MSA will preclude any repetition of the conduct at issue here.[27] These factors obviate any need for substantial punitive damages to achieve deterrence.

Thus, even accepting for present purposes the Oregon Supreme Court's conclusions that (i) the jury could have found Philip Morris's conduct to be "extraordinarily reprehensible," and (ii) the conduct somehow met Oregon's statutory definition of manslaughter, there is no need for a punitive award at the high end of the zero to 4:1 range.

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[27] The Oregon courts refused to consider the MSA (see *Williams* v. *Philip Morris, Inc.*, 51 P.3d 670 (Or. Ct. App. 2002); *Williams* v. *Philip Morris, Inc.*, 48 P.3d 824, 842-43 (Or. Ct. App. 2002)) and hence blinded themselves to this extraordinarily relevant factor in the excessiveness analysis. See *BMW*, 517 U.S. at 584 (duty of courts in evaluating punitive award for excessiveness is to "consider[] whether less drastic remedies could be expected" "to deter future misconduct").

In fact, however, both of the Oregon Supreme Court's conclusions were deeply flawed. To begin with, although the court concluded that the jury "could have" found high reprehensibility, the jury was not asked to make any such finding, made no such finding, and cannot be presumed to have made such a finding.[28] Indeed, most juries presented with essentially the same allegations, documents, and expert witnesses have returned verdicts for Philip Morris.[29]

Moreover, the Oregon Supreme Court took no account of the context in which Philip Morris's allegedly fraudulent statements were made: an environment saturated for decades with information about the risks of smoking from highly credible sources. The public was inundated by information about smoking and health throughout the time when Jesse Williams smoked. See pp. 1-2, 3 n.1, *supra*; J.A. 57a-59a, 159a-169a, 170a-171a, 172a-175a. See also *FDA*, 529 U.S. at 138, 144-45 (the dangers of smoking have been "well known" and "documented * * * in great detail" for decades). The warnings that have appeared on every pack of cigarettes since 1969 have been deemed by Congress to be "both neces-

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[28] The court's conclusion was the result of a deferential review of the record in which plaintiff was given the benefit of all inferenees that would support a finding of high reprehensibility, while mitigating evidence introduced by Philip Morris was ignored. See, e.g., Pet. App. 2a, 5a-8a, 23a. Although this Court declined to grant review to determine whether the Oregon Supreme Court's sufficiency-of-the-evidence type standard comports with *Cooper Industries* and *State Farm*, the fact that the Oregon court employed such a standard is surely relevant in assessing its finding of high reprehensibility.

[29] In 2003, for example, defense verdicts were returned in 8 out of 10 lawsuits by individual smokers seeking to hold Philip Morris liable for their injuries on theories very similar to that of respondent.

sary and sufficient" to inform the public of the risks of smoking. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 489 n.9 (1996).[30]

Plaintiff's evidence of relevant misconduct must be assessed against this backdrop – a flood of information about the risks of smoking. Of the 14 alleged misrepresentations concerning the link between smoking and cancer that were attributed to Philip Morris, only 7 appeared in media to which Williams might have had access. And plaintiff could offer no evidence that Jesse Williams ever saw or heard *any* statement attributed to Philip Morris. See pp. 2-3, *supra*. Indeed, Williams taught his own children not to smoke. J.A. 140a, 151a-152a. Thus, a fact-finder could well conclude that the alleged fraud had a minimal impact on Williams and was far less reprehensible than the court below hypothesized.

The point, however, is that no one knows how reprehensible the jury believed the misconduct to be, and the Oregon Supreme Court had no basis for upholding the award based on the conclusion that the jury "could have found" extreme reprehensibility. The inference that the jury made such a finding certainly cannot be drawn from the sheer size of the award, given that the jury was invited to impose punishment for the injuries of vast numbers of Oregon smokers. J.A. 197a, 199a. See *Simon* v. *San Paolo U.S. Holding Co.*, 113

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[30] The 1966 warning stated:

> CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH

Congress strengthened these warnings in 1969 and again in 1984, requiring such statements as:

> SMOKING CAUSES LUNG CANCER, HEART DISEASE, EMPHYSEMA, AND MAY COMPLICATE PREGNANCY
>
> QUITTING SMOKING NOW GREATLY REDUCES SERIOUS RISKS TO YOUR HEALTH.

J.A. 276a-278a.

P.3d 63, 70 (Cal. 2005) (in the absence of a specific finding, to infer one unfavorable to the defendant "from the size of the award would be inconsistent with de novo review, for the award's size would thereby indirectly justify itself").

Second, plaintiff conceded below that "the third *Gore* guidepost [was] of limited value because Oregon provides no civil penalty for private fraud and the criminal homicide statutes on which plaintiff relied in its briefing to the Court of Appeals are not 'truly comparable.'" Plaintiff's Response to Brief on the Merits in the Oregon Supreme Court at 27 (citation omitted). But rather than concluding that the third guidepost either is neutral or cuts against a $79.5 million penalty (see, *e.g.*, *FDIC* v. *Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997); *Groom* v. *Safeway, Inc.*, 973 F. Supp. 987, 995 (W.D. Wash. 1997)), the Oregon Supreme Court instead speculated that Philip Morris's conduct "would have constituted manslaughter." Pet. App. 27a. The court then proceeded to characterize the penalties for manslaughter as "severe" (*id.* at 29a) – notwithstanding its own recognition that the maximum penalty for a corporation convicted of manslaughter was $50,000 – and concluded that "the third guidepost, like the first, supports a very significant punitive damage award." *Ibid.*

The lower court's rationale proves too much. Every case in which punitive damages are imposed for intentional or reckless conduct that resulted in someone's death (*e.g.*, a substantial number of product-liability cases) could equally be characterized as one in which the conduct amounted to "manslaughter." And, under the logic of the opinion below, every such case would therefore be eligible for an unconstrained and substantially disproportionate ratio of punitive to compensatory damages. Needless to say, no tobacco company has ever been charged with manslaughter or any comparable crime.

The Oregon Supreme Court's invocation of the manslaughter penalty directly contradicted this Court's admonition in *State Farm* that "[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." 538 U.S. at 428.

To summarize: Even accepting the Oregon Supreme Court's analysis of the reprehensibility and comparable penalties guideposts, the ratio in this case can be no greater than 4:1. And we submit that "a lesser ratio, perhaps only equal to compensatory damages, reach[es] the outermost limit of the due process guarantee" (*State Farm*, 538 U.S. at 425) in this case for two independent reasons: (i) there is no prospect that the conduct in question will be repeated; and (ii) the Oregon Supreme Court's analysis of the reprehensibility and comparable penalties guideposts is wrong.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

KENNETH S. GELLER
EVAN M. TAGER
NICKOLAI G. LEVIN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
DANIEL B. KIRSCHNER
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick PC
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

MURRAY R. GARNICK
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF FOR RESPONDENT

JAMES S. COON
RAYMOND F. THOMAS
SWANSON THOMAS & COON
621 SW Morrison Street
Portland, OR 97205
(503) 228-5222

WILLIAM A. GAYLORD
GAYLORD EYERMAN
BRADLEY, P.C.
1400 SW Montgomery St.
Portland, OR 97201
(503) 222-3526

ROBERT S. PECK*
NED MILTENBERG
CENTER FOR CONSTITUTIONAL
LITIGATION, P.C.
1050 31st Street, N.W.
Washington, DC 20007
(202) 944-2803

CHARLES S. TAUMAN
CHARLES S. TAUMAN, P.C.
P.O. Box 19631
Portland, OR 97280
(503) 849-9821

*Counsel of Record *Counsel for Respondent*
Additional counsel on inside cover

MAUREEN LEONARD
ATTORNEY AT LAW
520 SW Sixth Avenue, Suite 920
Portland, OR 97204
(503) 224-0212

KATHRYN H. CLARKE
ATTORNEY AT LAW
P.O. Box 11960
Portland, OR 97211
(503) 460-2870

QUESTIONS PRESENTED

1. Whether due process allows a state to impose punitive damages based on the actual and potential effects of the defendant's wrongful conduct throughout the state?

2. Whether the ratio between compensatory and punitive damages comprises the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict?

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Petitioner Philip Morris engaged in one of the longest running, most profitable, and deadliest frauds in the annals of American commerce. Jesse Williams died of lung cancer in 1997 as a result of that lethal fraud. J.A. 66a-67a; Tr. Vol. 11-B at 40-41; Pl. Ex. 159. By then, Philip Morris had known for at least 40 years that cigarettes cause cancer and that millions of American smokers, about half of whom were its customers, were addicted to the nicotine in cigarettes. J.A. 62a-68a, 111a-113a, 221a; Tr. Vol. 12-B at 91-92; Pl. Ex. 36 at 2, Pl. Ex. 159. In order to stop existing smokers from quitting, encourage others to take up smoking, and maximize profits, Philip Morris vehemently denied the connection between smoking and cancer, as well as the addictive character of nicotine. It asserted that the research was wrong or inconclusive and reassured its customers it would never jeopardize their health. Pet. App. 38a-40a.

Jesse Williams's wife, Mayola, brought suit against Philip Morris after promising her dying husband that she would hold it responsible for betraying his trust. Tr. Vol. 12-B at 93-95. The lawsuit claimed that Philip Morris mounted a massive, fraudulent campaign to sow doubt about smoking and disease, knowing that it was likely to be effective with highly addicted smokers like Williams.

After a month-long trial, the jury found Philip Morris negligent but also found Williams 50% negligent. J.A. 289a. The jury also found Philip Morris liable for misrepresentation. J.A. 290a. It awarded $21,485.80 in economic and $800,000.00 in non-economic damages for each claim.[1] J.A. 289a. As to misrepresentation, the jury

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[1] A wrongful death cap reduced the $800,000 verdict to $500,000. J.A. 292a, citing OR. REV. STAT. § 18.560(1).

specifically found that "defendant ma[d]e false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied" and that "such false representations and reliance [were] a cause of damages to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988." *Id.*

On punitive damages, the jury was instructed, among other things, to consider "the likelihood that serious harm would arise in this state," the "defendant's awareness of that likelihood," and the profitability of defendant's misconduct in this state." J.A. 283a. Employing a clear and convincing evidence standard, the jury awarded $79.5 million in punitive damages. J.A. 291a. On Philip Morris's motion, the trial court found the punitive damages within the range that a rational juror could assess, but still reduced it to $32,000,000. J.A. 292a.

Both parties appealed. The Court of Appeals upheld the finding of fraud. J.A. 307a. It found that the evidence would permit the jury to conclude that Philip Morris misrepresented that smoking was not harmful to a person's health and that it intended Williams and other Oregon smokers to rely on this misrepresentation. J.A. 332a-333a. Further, the court found that a number of Williams's statements constituted direct evidence that he relied upon Philip Morris's misrepresentations and that the company "caused harm to many others in Oregon besides Williams." J.A. 321a, 331a. The court rejected Philip Morris's claim of instructional error and reinstated the $79.5 million punitive damages. J.A. 327a-328a. The Oregon Supreme Court declined review.

This Court granted certiorari, vacated the judgment, and remanded in light of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). *Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003). On remand, the Oregon Court of Appeals carefully reviewed this Court's punitive damage decisions and reached the same result it did the first time. Pet. App. 36a. The Oregon Supreme Court affirmed, finding

that "Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware," as it had "put a significant number of victims at profound risk for an extended period of time." Pet. App. 33a. The court held that the punitive award "comported with due process" because Philip Morris's "massive, continuous, near-half century scheme to defraud the plaintiff and many others" constituted "extreme and outrageous circumstances." *Id.*

SUMMARY OF ARGUMENT

Philip Morris accumulated billions in profits from history's longest running and deadliest fraud. Before this Court, Philip Morris downplays the evidence of its egregious misconduct, but the evidence was overwhelming. It knew but denied that smoking caused lung cancer and knew but denied that nicotine was addictive. It disseminated its denials deliberately and widely, through statements and through surrogates, knowing that highly addicted smokers like Jesse Williams would cling to the denials and keep smoking. It knew that if its campaign of misrepresentation were ever exposed its sales would fall, its high profits crumble, and its liability exposure would be high. It hoped that its advertising and public-relations campaigns and scorched-earth litigation tactics would forestall public reckoning.

The jury in this case specifically found that the scheme ensnared a large number of Oregonians, including Jesse Williams, who died because of the trust he reposed in Philip Morris's web of lies. From the 1950s through the trial of this case in 1999, Philip Morris never conceded what it knew to be true - that smoking causes cancer and many of its customers would die. Philip Morris, still denying its underlying liability and thus showing no contrition, also argues that no one should have believed its 40 years of denials in a campaign that it congratulated itself was "brilliantly conceived and executed."

Instead, Philip Morris asks this Court to abandon its unwavering doctrine that States may consider not just the harm to individual plaintiffs but the actual and potential public effects of misconduct in order to deter its repetition. It urges this Court to treat review of punitive damage awards as a simple arithmetic exercise that it has always rejected. Philip Morris would have this Court treat the ratio between compensatory and punitive damages as the conclusive and overriding determinant of a constitutional punitive damage award. That approach should be resisted. It would downgrade the historic and traditional principle that punitive damages should be proportionate to the enormity of the offense, and it would undermine Oregon's right to use punitive damages to protect its consumers and its economy. It would gloss over the fact-sensitive inquiry that must be made in each case and ignore the many justifications that this Court and others have outlined that justify a higher award.

Due Process provides no shelter against a verdict that follows statutory criteria to achieve deterrence and permits a verdict that disgorges a defendant's ill-gotten profit is justified. The historical record, rather than support Philip Morris's arguments, confirms the validity of the broad public and retributive purposes of punitive damages that the Oregon legislature adopted and the state supreme court applied. Where a fraud is as monstrous as this one was in its willingness to put lives at risk for profit, strong medicine is required.

ARGUMENT

I. THE PUNITIVE DAMAGE ASSESSMENT IN THIS CASE ACCORDS WITH *BMW* AND *STATE FARM* AND SATISFIES DUE PROCESS

Both the Oregon Court of Appeals and the Oregon Supreme Court reviewed this case *de novo*, with a scrupulous eye toward this Court's decisions in *State Farm* and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). First in

BMW and then again in *State Farm*, this Court established standards for determining whether a punitive damage award is "grossly excessive" and thus violates Due Process. That inquiry must begin "with an identification of the state interests that a punitive award is designed to serve." *Id.* at 568. The reviewing court then considers three guideposts: reprehensibility, proportionality, and comparability. *Id.* at 575; *see also State Farm*, 538 U.S. at 418.

Philip Morris argues that the Oregon Supreme Court erred by allowing reprehensibility and comparability to override "ratio." Pet. Br. at 27. That argument fails for three reasons. First, it improperly denigrates the primary, important, and historic role that reprehensibility plays in both the assessment of punitive damages and the determination of their proportionality. Second, it utterly ignores a State's authority to determine when and to what extent, within constitutional limits, punitive damages may be levied. Finally, it makes the consideration of the punitive-to-compensatory damage ratio into the exclusive measure of constitutionality and the overriding guidepost regarding an award's reasonableness.

A. Precedent Supports the Oregon Decision

The Oregon Supreme Court's decision in this case conforms to this Court's precedents, as well as the principles derived from punitive damage history and practice. From its earliest antecedents to its most recent application, one constant has helped define the law of punitive damages: an appropriate punitive award reflects "'the enormity of the offense.'" *BMW*, 517 U.S. at 575 (1996) (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)). This Court has found *this* proportionality principle "'deeply rooted and frequently repeated in common law jurisprudence.'" *Id.* at 575 n.24 (citation omitted). *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) ("[t]raditional common-law approach . . . consider[s] the gravity of the wrong.").

B. Reprehensibility Is the "Most Important Indicium" of an Award's Reasonableness

This Court has incorporated this traditional approach into its modern excessiveness jurisprudence, repeatedly emphasizing that the "'most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" *State Farm*, 538 U.S. at 419 (citation omitted). *See also* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 387 (1994) ("The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages." (quoted in *BMW*, 517 U.S. at 575 n.23).[2] *BMW* made plain the primacy of reprehensibility reflected in a long line of precedent that focused on the enormity of the offense. *BMW*, 517 U.S. at 575 (citing *Day*).

Given that it is difficult to conceive misconduct more reprehensible than Philip Morris's, it is little wonder that the company gives short shrift to that guidepost, even though it properly "receives the heaviest weight." *Williams v. Kaufman County*, 352 F.3d 994, 1016 (5th Cir. 2003) (citation omitted). The Oregon Supreme Court did not depart from this Court's teachings when it treated reprehensibility as the preeminent determinant of an award's reasonableness.

The record supports that court's finding that "Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware," Pet. App. 33a, unlike the *State Farm* plaintiffs who produced "scant evidence of

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[2] Many courts applied this criterion before *BMW* and, indeed, before ratification of the Fourteenth Amendment in 1868. *See, e.g., Stimpson v. The Railroads*, 23 F. Cas. 103, 104 (1847)(No. 13,456)(Grier, Cir. J.); *Dibble v. Morris*, 26 Conn. 416, 1857 WL 969, at *9 (Conn. 1857); *Smith v. People*, 25 Ill. 17, 1860 WL 6489, at *3 (Ill. 1860); *Pike v. Dilling*, 48 Me. 539, 1861 WL 1691, at *3 (Me. 1861); *Phelin v. Kenderdine*, 20 Pa. 354, 1853 WL 6203, at *6-*7 (Pa. 1853); *Pickett v. Crook*, 20 Wis. 358, 1866 WL 2763, at *1 (Wis. 1866).

repeated misconduct of the sort that injured them." 538 U.S. at 423. This record overflows with repeated actions over a period of more than forty years of precisely the conduct that brought about Jesse Williams's death.

State Farm emphasizes that the excessiveness inquiry is a highly fact-sensitive undertaking. 538 U.S. at 425 ("The precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct."). *See also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437-38 (2001). A review of the evidence leads inexorably to the Oregon Supreme Court's conclusion that "Philip Morris's conduct was extraordinarily reprehensible." Pet. App. 23a. In fact, Philip Morris's misconduct is uniquely monstrous. It successfully schemed to derive enormous profits by taking advantage of the weakness of its addicted customers and knowingly created the deadliest and most preventable public health disaster in American history. *Id.* at 38a-41a; Tr. Vol. 11-A at 61-63.

C. Philip Morris's Fraud Dwarfs the Reprehensibility of the Misconduct Examined in this Court's Prior Cases

The misconduct reviewed by this Court in previous punitive-damage cases pales by comparison to the record here. Motivated by an appetite for profit that could not otherwise be sustained and deploying battalions of high-priced public relations, scientific, and legal talent, Philip Morris "spread false or misleading information to suggest to the public that doubts remained about [whether smoking caused serious and sometimes fatal disease]." Pet. App. 23a. The Oregon Supreme Court found that Philip Morris did so "deliberately . . . to keep smokers smoking, knowing that it was putting the smokers' health and lives at risk, and it continued to do so for nearly half a century." *Id.*

Philip Morris began this campaign[3] when it joined other cigarette companies in developing a united response to a 1952 *Reader's Digest* article that reported new research findings linking smoking with cancer. The article is credited with causing cigarette sales to fall for the first time in the twentieth century. J.A. 313a; Tr. Vol. 7-A at 109-10. To counter this trend, Philip Morris embarked on an elaborate public relations campaign to ensure that people continued to buy and smoke cigarettes. Pet. App. 3a.

The campaign began with the publication of "A Frank Statement to Cigarette Smokers." J.A. 318a. The "Frank Statement," which first appeared as an advertisement in 448 newspapers throughout the United States, *id.*, castigated "experiments with mice" as both inconclusive and subject to serious question by "eminent doctors and research scientists." J.A. 202a. Accepting an interest in their customer's "health as a basic responsibility, paramount to every other concern in our business," the "Frank Statement" asserted "the products we make are not injurious to health." J.A. 202a-03a. Instead, it contended that tobacco had a 300-year history of providing "solace, relaxation, and enjoyment to mankind" even though it has been accused of being "responsible for practically every disease of the human body." J.A. 203a. The "Frank Statement" reported that "[o]ne by one these charges have been abandoned for lack of evidence," as it suggested would be true of lung cancer. J.A. 203a. The "Frank Statement" also announced the establishment of the Tobacco Industry Research Committee (TIRC) (later renamed the Council for Tobacco Research (CTR)) to conduct research into "all phases of tobacco and

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[3] Undertaking the campaign seemed utterly natural to Philip Morris, whose early ads touted positive health effects for its cigarettes that were demonstrably false and caught the attention of the Federal Trade Commission. *See* Richard Kluger, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 131-32 (1997).

health," to be led by "a scientist of unimpeachable integrity and national repute." J.A. 203a.

The Frank Statement marked the beginning of Philip Morris's "common front" approach, involving the TIRC/CTR and nearly all members of the tobacco industry, an approach that used seemingly scientific pronouncements to foster doubt about the causal connection between smoking and disease.[4] J.A. 318a-319a & 62a-63a. The CTR was set up as a "front" and a "shield" for the industry on health questions. Pl. Ex. 104 at 2. Neither TIRC nor CTR ever actually conducted research on "all phases of tobacco and health," as had been promised. Instead, both focused on trying to discover plausible alternative explanations for the epidemic of lung cancer among smokers. J.A. 320a; 87a-89a; Pet. App. 38a. TIRC/CTR also provided expert witnesses and technical support for congressional hearings and litigation. Pl. Ex. 104 at 2.

D. Philip Morris Knew Smoking Caused Cancer

Cynicism dominated what Philip Morris did about its knowledge of its product's deadly effects. At a 1953 meeting of tobacco company executives, one official admitted, "It's fortunate for us that cigarettes are a habit they can't break." Pl. Ex. 1. In 1958, visiting British scientists talked with tobacco industry scientists, including two from Philip Morris, and of the 32 scientists in attendance, only one (not from Philip Morris) who was not convinced that "smoking causes lung cancer." Pl. Ex. 28 at 1-2. About the same time, Philip Morris research chief C. Mace penned a July 24, 1958

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[4] In *United States v. Philip Morris USA, Inc.*, Civ. Action No. 99-2496 (D.D.C. Aug. 17, 2006), *available at* http://coop.dcd.uscourts.gov/99-2496-082006a.pdf, the court found that Philip Morris paid about $200 million in support of this effort, including more than $189 million to fund the TIRC and its successors from 1954 to 1999, nearly $6 million for special projects from 1966 to 1990, and nearly $5 million for literature retrieval from 1971 to 1983. Slip op. at 36, ¶¶ 42, 43, 44.

memo acknowledging that the evidence "is building up that heavy cigarette smoking contributes to lung cancer either alone or in association with physical and physiological factors" and advocating that Philip Morris start producing safer cigarettes to get ahead of the public-health wave. J.A. 211a. The evidence is overwhelming that Philip Morris knew that "[s]moking causes lung cancer." *Id.*; Ex. 28 at 2.

Despite knowledge of its falsity, Philip Morris continued to make pronouncements similar to the "Frank Statement," including one by Vice President George Weissman that Philip Morris would "stop business tomorrow" if it thought that its product was harming smokers, and another by spokesman James Bowling that "there was no connection" between smoking and disease and that Philip Morris "wouldn't be in the business" if it thought there was. J.A. 318a, 205a, 208a-209a; Ex. 47, 161 at 1.[5]

In 1964, the U.S. Surgeon General issued a report that smoking contributed substantially to mortality rates from lung cancer and other diseases. Pl. Ex. 159. Philip Morris carefully and successfully plotted to blunt the impact of the report by issuing preemptive statements — that the press (including the Oregon newspapers) published — which spun the report as nothing new, tentative, unclear, and even supportive of the company's longstanding deception that more research was needed. J.A. 222a; Pl. Ex. 161.

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[5] Philip Morris often recited the "we'd stop business tomorrow" mantra. On January 24, 1972, the Wall Street Journal quoted Bowling, by then a vice president, saying: "[i]f our product is harmful . . . we'll stop making it. We now know enough that we can take anything out of our product." *United States v. Philip Morris*, Slip Op. at 306, ¶ 741. Bowling added, "[w]e don't know if smoking is harmful to health, and we think somebody ought to find out." *Id.* As late as 1997, Philip Morris's Chief Executive Officer stated, that cigarettes do not cause lung cancer, but if they did, "[I'd] probably . . . shut [the] company down instantly to get a better hold of things." *Id.* at 326, ¶ 806.

Afterwards, a Philip Morris vice president exalted that "press reflections are comparatively mild" and that "public reaction was not as severe nor did it have the emotional depth I might have feared." J.A. 221a. He added that "*we must in the near future . . . give smokers a psychological crutch and self-rationale to continue smoking.*" J.A. 222a; 319a (emphasis added). A new plan was then devised to insist that there was "no proof that smoking causes cancer," while offering "ready-made credible alternatives" that could be blamed for the incidence of cancer. J.A. 319a.

Philip Morris spared neither imagination nor expense in devising a continuous campaign to overcome public health warnings about the dangers of smoking. When its first-wave strategy of outright denial grew too threadbare, Philip Morris commissioned public opinion surveys to refine its message. It quickly found that "there are millions of people who would be receptive to a new message stating: Cigarette smoking may not be the health hazard that the anti-smoking people say it is because other alternative [explanations for lung cancer] are at least as possible." J.A. 242a (emphasis in original). Thus, Philip Morris attempted to divert the blame from smoking to "air pollution, viruses, food additives, occupational hazards and stresses." *Id.* Philip Morris also developed a plan to recruit a prestigious scientific panel to tell the public, officeholders, and opinion leaders that cancer was caused by everything but tobacco use. *Id.* at 242a-243a.

Philip Morris maintained this deceptive PR strategy throughout the 1970s, 1980s, and 1990s. J.A. 319a. Its "counter propaganda" was not limited to the relationship between smoking and health, however. Publicly, Philip Morris denied that the nicotine in cigarettes was addictive. J.A. 272a-274a. It falsely denied reports that it manipulated the nicotine content or delivery of cigarettes, J.A. 272a-273a, even though it had experimented with and successfully implemented methods for increasing nicotine content and facilitating delivery in cigarettes as early as 1960. J.A. 214a; 216a; 225a, 245a; Pl. Ex. 57 at 1, 58 at 1, 134 at 1, 139 at 1.

Privately, however, Philip Morris concluded that "no other rationale is adequate to sustain the habit [of smoking] in the absence of nicotine." Pl. Ex. 72 at 2. Philip Morris's research director best described the company's attitude, stating "the thing that we sell most is nicotine." J.A. 251a. Philip Morris used its research data that suggested that "a minimum concentration of nicotine is needed for the smoker's satisfaction" to its financial advantage by introducing lower tar and nicotine cigarettes. Pl. Ex. 57 at 1, 134 at 1, 139 at 1. As smokers switched to lower tar and nicotine cigarettes, Philip Morris knew they would increase their cigarette consumption to maintain their nicotine intake. Pl. Ex. 57 at 1.

Although as far back as 1959 it had identified "addiction" as one of the major reasons smokers smoke, Pl. Ex. 36 at 2, Philip Morris publicly denied the addictive properties of nicotine, even through this 1999 trial, because it believed "the entire matter of addiction is the most potent weapon a prosecuting attorney can have in the lung cancer/cigarette debate. We can't defend continued smoking as 'free choice' if the person was 'addicted.'" J.A. 253a.

Philip Morris now plays down the efficacy of its extraordinarily expensive investment in this unrelenting campaign[6] to nourish smokers' doubts about the truthfulness of public health messages against smoking, suggesting it was spending hundreds of millions for nothing and that Jesse Williams and other smokers should have seen through it. Pet. Br. at 41-42. That stance today contrasts tellingly with internal corporate documents that celebrated

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[6] Philip Morris's strategy for corporate survival was very successful, as it now boasts that it is the "nation's leading cigarette manufacturer and for more than 20 consecutive years has had the highest revenues, income, volume and market share among U.S. tobacco companies." http://www.philipmorrisusa.com/en/about_us/pmusa_at_a_glance.asp (last visited Sept. 9, 2006).

the company's efforts as a "brilliantly conceived and executed" public relations strategy to "defend itself" against public acceptance of the linkage between smoking and disease in "litigation, politics, and public opinion." J.A. 240a. It contrasts with corporate documents showing that Philip Morris knew its customers were physically and psychologically dependent on the nicotine in its products (J.A. 214a, 216a, 225a-226a; Pl. Ex. 36 at 2, 46, 52 at 2, 58 at 1, 72 at 2, 4, 8-9), that Philip Morris deliberately manipulated the quantity and delivery of nicotine to smokers to keep them hooked (J.A. 214a-215a, 216a-217a, 225-226a, 255a; Pl. Ex. 96 at 1), and that Philip Morris knew that at least 85% of its customers wished they never started smoking.[7] Pl. Ex. 128. It contrasts with internal memoranda that confidently proposed giving nicotine-dependent smokers a "psychological crutch and a self-rationale to continue smoking." J.A. 222a. It contrasts with the more aggressive strategy adopted in the early 1970s that utilized "strongly voiced opposition and criticism" to what they called the "exaggerations and lies of the anti-cigaret zealots." J.A. 238a. It contrasts with Philip Morris's repeated public statements, crafted at great expense, proclaiming that there was considerable scientific doubt about the relationship between smoking and disease. J.A. 222a; Pl. Ex. 161. As the Oregon Supreme Court noted, Philip Morris "would not spend over 40 years of time, effort and money to deceive people, unless it thought it was succeeding." Pet. App. 8a, n.1.

Indeed, the details of Philip Morris's campaign, which make up the record in this case, place the company's misconduct at the extreme end of the reprehensibility scale. Pet. App. 23a. Courts in other jurisdictions, reviewing a

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[7] Justice Breyer, relying on statistics from the Centers for Disease Control, once noted that "only 2.5% of smokers successfully stop smoking each year, even though 70% say they want to quit and 34% actually make an attempt to do so." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 191 (2000) (Breyer, J., dissenting).

similar record, have uniformly condemned Philip Morris's conduct. Quite recently, some seven years after the jury's punitive verdict in this case, Judge Kessler concluded that Philip Morris and other tobacco companies were in continuing violation of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Judge Kessler based that decision on the same conduct at issue here, finding that Philip Morris had

> survive[d] and profit[ed], from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community. . . . In short, Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.

United States v. Philip Morris USA, Inc., Slip Op., at 3-4. As another court put it, "'Philip Morris's conduct was in fact reprehensible in every sense of the word, both legal and moral.'" *Boeken v. Philip Morris, Inc.*, 26 Cal. Rptr.3d 638, 677 (Cal. App. 2d Dist. 2005) (quoting trial court with approval), *cert. denied*, 126 S.Ct. 1567 (2006).

Philip Morris's strategy worked as planned on thousands of smokers, including Jesse Williams, who seized the "crutch" the company offered and rationalized his addiction-driven urge to continue smoking. Tr. Vol. 9-B at 138, Vol. 11-B at 41; Pl. Ex. 159. By 1997, when Jesse Williams

lost his battle with lung cancer, Philip Morris had known for at least 40 years that cigarettes cause lung cancer and that millions of American smokers, about half of whom were its customers, were addicted to the nicotine in cigarettes. Pet. App. 3a, 5a; Pl. Ex. 36 at 2; Tr. Vol. 9-A at 131-40, 11-A at 61-63.

There can be no doubt that Philip Morris's longstanding fraudulent scheme was extremely successful. The company shipped 235 billion cigarettes and made a net profit of $1.6 billion the year that Jesse Williams died. Tr. Vol. 14-A at 49-50, 55. In 1996, when Jesse Williams was diagnosed with lung cancer, Philip Morris netted a $2 billion profit. *Id.* at 58. At the time of Jesse Williams's posthumous trial, Philip Morris had a net worth of more than $17 billion and held a 51% share of the domestic cigarette market. Pet. App. at 74a; Tr. Vol. 14-A at 57. It had a very high profit rate of 16.25% as a percentage of revenue for 1997. Tr. Vol. 14-A at 65-66.

E. Philip Morris's Misconduct Implicated at Least Four of the Aggravating Factors that Justify a Higher Award

To determine reprehensibility in any particular case, and thus the level of punishment and deterrence needed, this Court has instructed courts to consider the presence or absence of five aggravating factors, specifically whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419 (citations omitted).

These aggravating factors were generally absent in *State Farm* so that the harshest condemnation this Court could

muster for the defendant's conduct in that case was that it "merit[ed] no praise." *Id.* Here, at least four factors are unquestionably present, which weighs heavily in favor of the punitive damages award.[8] First, unlike *State Farm* and *BMW*, the harm here was not merely economic, but both physical and lethal, which by itself warrants a very substantial punitive damages award. *BMW*, 517 U.S. at 576.

Second, *State Farm* held that a defendant's indifference to or reckless disregard for the health or safety of others also supports a larger award. 538 U.S. at 419. Here, Philip Morris was not merely indifferent to its customers' health, but devised a 40-year campaign to deny the deadly and addictive effects of its products, in order to sustain its staggering profits. J.A. 317a-321a; Pet. App. 3a-6a. Its actions were more egregious and its profits much greater than in any other case on record, which heightens the reprehensibility of its misconduct far beyond any case this Court has considered.

Third, Philip Morris's misconduct was not an isolated lapse in an otherwise sterling history, but a carefully orchestrated, multi-decade deception, the sole purpose of which was to maintain its profits by convincing its still-living customers to continue to smoke and make others feel its was safe to take up smoking. Pet. App. 3a-6a.

Finally, Philip Morris's wrongdoing was much more than mere accident or misadventure. It was corporate policy maintained over decades by large numbers of top executives and their successors at a cost of hundreds of millions of dollars. Messages known to be false were carefully crafted and expertly disseminated through mass media to millions of customers and prospective customers.[9]

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[8] *See* Brief *Amici Curiae* of the Campaign for Tobacco-Free Kids, American Cancer Society, *et al.*, at 5-29.

[9] Philip Morris's misconduct arguably implicated *State Farm's* fifth

Reprehensibility is not a number. It is not enough to say whether all the reprehensibility factors are or are not met. Misconduct causing minor physical injury is not as reprehensible as misconduct causing death. Even "repeated" misconduct can be minor compared with a nationwide fraudulent scheme spanning four decades. The rules for deciding whether a punitive award is "grossly excessive" must allow for punishment and deterrence where misconduct is so monstrously and, one hopes, uniquely reprehensible as it is in this case.

Philip Morris knew that its conduct killed its customers, knew that many of them were physically addicted and financially vulnerable, and knew that, if its actions were discovered, it would justify substantial punitive damages. Philip Morris's misconduct was exponentially more egregious than what happened in *BMW* and *State Farm*.

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factor, too, despite the fact that the Oregon Supreme Court said there was "no evidence that Williams was especially financially vulnerable." Pet. App. 24a. The evidence established that Williams had retired as a public school janitor, which indicates that he likely did not have a large income during his working life or a large pension afterwards. That the economic damages were only $21,485.80 (all of which were medical expenses) also supports the assertion that he was financially vulnerable. Moreover, it is beyond dispute that the many Oregonians that Philip Morris targeted in perpetrating this fraud were people of modest means for whom the purchase of cigarettes was a major weekly expense. More important on the facts of this case, Jesse Williams, like many other smokers, was "highly addicted" to cigarettes. Tr. Vol. 4B at 20. He was therefore *physically* vulnerable to defendant's fraudulent campaign, and that vulnerability was a crucial link in the campaign itself. Pl. Ex. 1 ("It's fortunate for us that cigarettes are a habit they can't break."). Further, that vulnerability was not just incidental but was created by defendant's product itself. J.A. 229a ("[T]he primary motivation for smoking is to obtain the pharmacological effect of nicotine.").

F. Jesse Williams and Many Others Were Victims of Philip Morris's Fraud

Philip Morris still denies that Jesse Williams[10] — or anyone else, for that matter — received and relied upon thousands of misrepresentations churned out by its multi-million dollar campaign. Pet. Br. at 3. The jury rejected this contention, specifically finding that Philip Morris made "false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied" and that the "false representations and reliance" were a cause of his death. J.A. 290a. The Seventh Amendment's Reexamination Clause requires due deference to this finding. *See Cooper Indus.*, 532 U.S. at 439 n.12 ("[n]othing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings.").

Indeed, Williams's wife, Mayola, testified that he told her that he had heard statements on television that "tobacco doesn't cause you cancer," showed her written materials that rebutted her pleas to quit, and, agreed with "the tobacco company," line that "everything is causing cancer."). *See, e.g.*, J.A. 129a-130a, 132a-133a, 138a, 148a-149a.

Although Philip Morris argues that there was insufficient evidence that Williams relied on any specific misrepresentation, this is not unexpected in light of the facts that he was dead and unable to testify, that the family arguments about smoking were so tense that they were often cut short when they could not be avoided altogether, that Mayola had no reason to preserve the articles and materials he used in rebuttal over the years, and that Philip Morris's fraudulent campaign was frequently advanced

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[10] Before the Court of Appeals, Philip Morris argued that only "a subset of Oregon smokers" were potentially affected by its misrepresentation, but "the record contains evidence of only one such smoker — Jesse Williams." J.A. 305a.

through surrogates and on broadcasts or by the use of its advertising power to plant or change stories and slant editorials in seemingly neutral publications. J.A. 320a; Tr. Vol. 7-B at 34-35, 39.

Philip Morris witness Glenn May testified he had reviewed every publication that Jesse Williams could have read about smoking and health and identified a three-inch stack of articles from the Oregonian, a publication Williams read, that contained denials of tobacco's dangers and addictive qualities. *See* Tr. Vol. 15-B at 73; Pl. Ex. 175 (consisting of those articles). The Court of Appeals, after reviewing the record, concluded that "[t]here is evidence that Williams received the message that the defendant intended to communicate and that the message affected his decision to continue smoking and not to make more serious efforts to overcome his addiction to cigarettes." J.A. 321a.

Perhaps the most telling evidence regarding Jesse's knowledge of and belief in Philip Morris's message was the sense of betrayal he expressed when told he had lung cancer: "those darn cigarette people finally did it. They were lying all the time." J.A.149a.

Just as Jesse was likely to see Philip Morris's misrepresentations, which was Philip Morris's design, so were thousands of other Oregonians. In fact, Philip Morris conceded as much in its brief seeking a reduction of punitive damages in the trial court by stating that its scheme "affected an undetermined (but surely relatively small) number of people such as Jesse Williams." J.A. 297a. It further argued against comparing these punitive damages with those awarded in California because "any award in this case for Oregon harms should be proportionately smaller" for "California is approximately ten times the size of Oregon." J.A. 298a.

The Court of Appeals found:

> there is evidence concerning other Oregon victims of defendant's decades-long

> fraudulent scheme. The tobacco industry and defendant directed the same conduct toward thousands of smokers in Oregon. They all received the same representations, from the same entities, and through the same media, and the industry intended to induce Oregon smokers to act on those representations in the same way. That conduct was a fundamental part of defendant's business strategy; Williams was simply one of its many Oregon victims.

Pet. App. 66a.

Philip Morris's reprehensible misconduct was conducted on a scale that affected Jesse Williams and significant numbers of Oregonians. In stark contrast to the record in *State Farm*, there was ample evidence of the "adverse effect on the state's general population." 538 U.S. at 427. The unprecedented scope, length, lethality, and profitability of that misconduct fully supports this award.

II. A State's Use of Punitive Damages to Deter Misconduct Does Not Offend Due Process

This Court "'accord[s] substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (citation omitted), and has repeatedly recognized that "[s]tates necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Id. See also State Farm*, 538 U.S. at 422 (each state "may make its own reasoned judgment" about the scope and measure of punitive damages).

States have treated punitive damages in varying ways, with five states barring them for all or most claims[11] and others imposing limits on their amounts.[12] Still others, like Oregon, have chosen to punish and deter egregious misconduct in sums large enough to effectively deter others. Due Process does not prohibit any of these state policy preferences.

In order to answer what this Court called the first inquiry in determining whether punitive damages are excessive, it is appropriate to examine the statutory factors that define the State's interest in light of the facts adduced in the record. Before punitive damages may be pleaded in Oregon, a plaintiff must produce admissible evidence sufficient to make a jury case that the defendant "acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has *acted with a conscious indifference to the health, safety and welfare of others.*" OR. REV. STAT. §§ 31.725(3), 31.730 (emphasis added). Plaintiff cannot seek discovery of the defendant's financial condition until the court grants a motion to amend the complaint to add the punitive damage claim. *Id.* at § 31.725(6). At trial, plaintiff must prove his case for punitive damages by "clear and convincing evidence," and the jury is instructed on that requirement. *Id.* at § 31.730(1). In addition, the jury is instructed on the factors considered in assessing punitive damages, including the likelihood of harm, defendant's awareness of that likelihood, the "profitability of the defendant's misconduct," the duration and concealment of the misconduct, defendant's response to discovery of the misconduct, the defendant's financial condition, and the "total deterrent effect of other

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[11] *See* Amicus Br. of Am. Tort Reform Ass'n (ATRA), at 8 n.5.

[12] *See BMW*, 517 U.S., at 614-619 (Ginsburg, J., dissenting). Since then, a number of additional states have capped punitive damages. *See Cooper Indus.*, 532 U.S. at 433 n.6.

punishment imposed upon the defendant as a result of the misconduct."[13] OR. REV. STAT. § 30.925(2).

Both the trial court and reviewing courts consider whether the verdict is supported by the "rational juror" test. *Id.* at § 31.730(2). In addition to this mandatory review, the trial court may reduce the jury's award if the defendant shows it has taken remedial measures to guard against future misconduct or prior punitive damages assessed against defendant were assessed for the same misconduct. *Id.* at § 31.730(3). Still further review occurs as required under *Cooper Indus.* These very substantial procedural and substantive statutory requirements constrain a jury's award of punitive damages and suggest that the award in this case should be accorded the deference due a properly rendered state court verdict.

Significantly, under Oregon's statutory scheme, juries and courts must consider both the profit the defendant derived from its misconduct and whether "total deterrent effect" has yet been achieved. OR. REV. STAT. § 30.925(2). These factors are consistent with the goal of deterrence. Law and economics scholars argue that optimal deterrence is only achieved when the punitive damages increase as the probability that a defendant's wrongdoing will be detected decreases. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 890 (1998). *See also Amicus* Br. of Keith N. Hylton, *et al.* Where, as here, a hidden fraudulent scheme took place over four decades, defrauding Oregon consumers and ruining their health, Oregon's interest in deterrence must be regarded as being at its apogee. Law and economics principles also emphasize that it is both appropriate and

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[13] As part of its concern with changing conduct, Oregon allows a court, upon defendant's motion, to reduce the punitive damages when the defendant has taken appropriate remedial measures to prevent the misconduct's reoccurrence. OR. REV. STAT. § 31.730(3).

essential to deny a defendant its ill-gotten gains through disgorgement. *See* Dan B. Dobbs, *Ending Punishment in Punitive Damages: Deterrence – Measured Remedies*, 40 ALA. L. REV. 831, 866 (1989).

A. Deterrence Would Not Be Adequately Served by a Lower Award

In contrast, the approach Philip Morris advocates would foreclose Oregon's emphasis on deterrence and guarantee a regime of underdeterrence, in which the punitive damages collected will always be less than the harm inflicted and the profits derived. If only one in one hundred victims brings such a lawsuit, then a higher award for deterrence purposes is both sensible and fair. *See Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677-78 (7th Cir. 2003)(Posner J.). *See also, Hopkins v. Atl. & St. Lawrence RR.*, 36 N.H. 9 (1857) (there is no deterrence when a defendant knows few will sue and uses its wealth to assure that result).

Due Process does not bar Oregon from focusing on profits in order to "protect[] its own consumers and its own economy." *BMW*, 517 U.S. at 572. Paraphrasing Justice Holmes, this Court has acknowledged that the "Constitution does not require the States to subscribe to any particular economic theory." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987).

Philip Morris suggests to this Court that it has been sufficiently deterred and that no punitive damages should be assessed against it at all. Pet. Br. at 9, 34, and 40 (arguing in favor of a zero ratio). It also argues that monies paid in the Master Tobacco Settlement, resulting from state lawsuits seeking restitution for health care expenditures made for tobacco-related diseases, provides all the deterrence needed to serve Oregon's interest. Pet. Br. at 40. These arguments should be rejected.

B. Deterrence of a Profitable Fraud Requires Strong Medicine

This Court has recognized that repeated instances of profitable but wrongful misconduct demonstrate that "strong medicine is required" to deter further repetition. *BMW*, 517 U.S. at 577. A decision that this misconduct merits no or relatively little punitive liability would send an anti-deterrence message to other companies: there is a green light on profitable fraud, you *may* lose little of that profit at most, and, if you feign contrition, you may keep it all.

Philip Morris has not been deterred by longstanding government regulation of its industry or the Master Tobacco Settlement (MSA). In fact, a federal district court recently found some aspects of the same underlying fraud in this case continue to this day, in violation of the federal RICO statute in an action brought by the U.S. Justice Department. *U.S. v. Philip Morris USA*. The court in that case lamented the fact that the U.S. government could not obtain disgorgement as a remedy. Slip op. at 1624. That Philip Morris and its tobacco *amici* (*see Amicus* Br. of R.J. Reynolds Tobacco Co. *et al.*, at 8-10) continue to protest that they should not be held liable at all for their multi-decade fraud. Pet. Br. At 41. Deterrence is plainly still needed.

Moreover, a punitive damage award must be "'not only a punishment sufficient to deter similar conduct on the part of the particular tortfeasor,' but 'must also be sufficient to deter others.'" *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373, 378 (8th Cir. 1993)(citation omitted), *cert. denied*, 511 U.S. 1115 (1994).[14]

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[14] *See alsoUnion Pacific R.R. Co. v. Barber*, 356 Ark. 268, 300, 149 S.W.3d 325, 346 (Ark. 2004)("It is important that the punitive damages be sufficient to deter others from comparable conduct in the future."); *Gober v. Ralphs Grocery Co.*, 137 Cal.App.4th 204, *223, 40 Cal.Rptr.3d 92, 107-08 (Cal. App. 2006); *Burns v. Prudential Securities, Inc.*, __ N.E.2d __, 2006 WL 1891829, at *32 (Ohio App. 2006); *Casumpang v. Int'l Longshore &*

In fact, an award's impact on others explains why punitive damages were often referred to as "exemplary" damages. *See, e.g.*, Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 715 (1957). Professor Owen explained, "By punishing intentional law-breakers, society restores all its members to a position of equal worth, and reinforces the confidence of law-abiders in the basic fairness of the legal system and in the utility of their personal decisions to obey the law." Owen, 39 VILL. L. REV. at 376 (footnotes omitted).

C. The Master Settlement Has No Impact on this Award

No effect on this award should be derived from the Master Settlement Agreement between tobacco companies and state attorneys general. By its own terms, the MSA limits its import. First, it provides that "no part of any payment under this Agreement is made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages." MSA, § XVIII (d), at 105 (available at http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf). Second, the MSA provides that neither the agreement nor any public statements about it "shall be offered or received in evidence in any action or proceeding for any purpose other than in an action or proceeding arising under or relating to this Agreement." MSA, § XVIII (f), at 106.

Finally, even if the MSA itself did not bar its use for the purpose the company now proposes, Philip Morris took the position at the trial court that the only relevance of the MSA is as an offset to "the State of Oregon's portion of the punitive damages verdict and judgment in this case," a reference to the 60% of any punitive damage award due to

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Warehouse Union, Local 142, 411 F.Supp.2d 1201, 1221-22 (D. Hawai'i, 2005); *Baker v. John Morrell & Co.*, 266 F.Supp.2d 909, 961 (N.D.Iowa, 2003).

be paid into the state crime victim's fund pursuant to OR. REV. STAT. § 31.735(1)(b). J.A. 292a. The MSA does not affect the amount of punitive damages justified in this case.

III. RELIANCE ON A STRICT MATHEMATICAL FORMULA WOULD VITIATE DETERRENCE

The jury's punitive assessment in this case was not the product of bias or whim. Rather it reflected an understanding of the enormity of Philip Morris's offense and the need for punitive damages sufficiently large to counter the economic imperative that drove the company to maintain its incredibly expensive but even more lucrative fraud. Although Philip Morris complains about the primacy the Oregon courts gave the reprehensibility guidepost, Pet. Br. at 27, the formula it urges would make the ratio between punitive and compensatory damages the conclusive and overriding determinant of the reasonableness of any award. If this Court were to endorse a flat ratio approach for all cases, regardless of the facts, it would enable tortfeasors to project which frauds and other offenses would remain cost-effective and thereby enfeeble the traditional deterrent function of punitive damages.

This Court has rejected these entreaties before and repeatedly, categorically, and wisely rejected the mathematical bright-line straitjacket that Philip Morris prefers. *Haslip*, 499 U.S. at 18 ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable."). *Accord TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1991); *BMW*, at 582 & 585; *Cooper*, at 434-35; *State Farm*, at 424-25. This Court's *BMW* and *State Farm* decisions defined a process of judicial review, not an exercise in elementary arithmetic. The facts in this case dramatically demonstrate why this Court should not retreat from those holdings and legislate a fixed formula for punitive damages.

Responding to an argument like Philip Morris makes here that an immutable ratio should define the upper limit

of a punitive award, Judge Richard Posner wrote: "The Supreme Court did not, however, lay down a 4-to-1 or single-digit-ratio rule . . . and it would be unreasonable to do so." *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003). Similarly, as the Fifth Circuit described it, the ratio "factor does not impose a mathematical formula for constitutional proportionality, but instead only embodies 'a general concern of reasonableness.'" *Kaufman County*, 352 F.3d at 1016 (quoting *BMW*, 517 U.S. at 582-83.).

A. The Compensatory Damages in this Case Provide a Poor Denominator for any Ratio Analysis

The slavish adherence to ratios favored by Philip Morris is problematic for many reasons. As Professor Priest observed, such a ratio approach can have the anomalous effect of multiplying compensatory damages for less blameworthy conduct that caused a huge loss, while underestimating punitive damages in truly "repugnant and reprehensible actions [that] generate little harm." George Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 838 (1996).[15]

A ratio is no talisman. *See TXO*, 509 U.S. at 467 (Kennedy, J., concurring). This Court has recognized that treating punitive damages as a simple reflection of the relationship between actual and punitive damages fails to account for fact-sensitive considerations and, most especially, potential harm to those who just as easily could

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15 *See also* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 30 n.140 (1982) ("[a]ctual harm that occurred is at best a crude measure of the moral egregiousness of a defendant's conduct and, hence, of the punishment deserved. If degrees of egregiousness were ranked along a scale ranging from accidental 'acts of God' through negligence to deliberately injurious acts, one would not expect to find any correlation between egregiousness and the gravity of the injury sustained by an individual plaintiff. Death, disabling physical injury, or substantial economic loss may result from acts that fall at any point on the egregiousness scale.").

have been victims of the defendant's misconduct. *Id.* at 460. *See also BMW*, 517 U.S. at 585. As such, this Court's reluctance to adopt a mathematical bright-line reflects a proper understanding that a rigid rule would actually undermine the punishment and deterrent effect of punitive damages, making punitive damages a minor cost of doing business.

In *State Farm*, this Court articulated at least four *non-exclusive* examples of conduct that merits punitive damages higher than a single-digit ratio:

1) where "'a particularly egregious act has resulted in only a small amount of economic damages,'" 538 U.S. at 425 (citation omitted);

2) where "'the injury is hard to detect,'" *Id.* (citation omitted);

3) where "the monetary value of noneconomic harm might have been difficult to determine," *Id.* (citation omitted);

4) where the defendant is a recidivist who has engaged in "repeated misconduct of the sort that injured [plaintiffs]." *Id.* at 423.

Other courts have added to this list:

5) where the misconduct is lucrative or potentially so, *Mathias*, 347 F.3d at 676;

6) where wealth enables "the defendant to mount an extremely aggressive defense . . . [and] by doing so to make[s] litigating against it very costly," *Id.* at 677;

7) where a larger ratio is necessary to motivate the prosecution of a meritorious claim; *Gavin v. AT&T, Inc.*, ___ F.3d ___, No. 05-4398, 2006 WL 2548238, at *6 (7th Cir. Sep't 6, 2006); and,

8) where the misconduct is extremely reprehensible. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004).

Each of these justifications is present in this case. First, economic damages in this case amounted to $21,485, an extremely insubstantial figure for a death. Although $800,000 was awarded for noneconomic damages, a wrongful death cap reduced that number to $500,000. These damages do not amount to the type of "complete compensation" that *State Farm* suggested was necessary to justify a reduction in the award. 538 U.S. at 426. The incompleteness of the damages is magnified by limitations on recoveries in wrongful death. This Court has recognized that "death is different," and rules that may be sensible in some contexts may not apply when human life is at stake or the value of a life is being assessed. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 994 (1991)(collecting cases).

This case highlights why a ratio regime is particularly problematic in wrongful death cases. Oregon's statutory cause of action for wrongful death does not purport to determine the value of the life taken. Under its wrongful death statute, compensatory damages are based on the monetary losses of the decedent's family, such as medical bills, burial costs, and loss of the decedent's economic contribution to the family.[16] OR. REV. STAT. § 30.020. Thus, the amount of compensatory damages awarded in wrongful death cases do not purport to represent the actual extent of harm caused by the defendant, but merely a portion of the monetary loss to the surviving family. The result is a "systematic underestimation of damages." William M.

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[16] By statute, the surviving spouse and children are also entitled to noneconomic damages for loss of the "society, companionship and services of the decedent." OR. REV. STAT. § 30.020(2)(d). That recovery, however, is limited to a maximum of $500,000 regardless of the amount the jury determines is necessary to compensate them for those losses and regardless of the number of survivors. OR. REV. STAT. § 18.560.

Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF TORT LAW 187 (1987).[17]

Second, the difficulty of measuring the noneconomic harm in wrongful death cases provides further justification for making this case one in which ratios are less instructive. *Compare State Farm*, 538 U.S. at 425 (justifying punitive damage amounts above single-digit ratios where "the monetary value of the noneconomic harm" is "difficult to determine."). As Professor Ellis observed, "[w]rongful death is an area of the law in which the measurement of loss in pecuniary terms presents intractable difficulties." Ellis, 56 S. CAL. L. REV. at 30 n.140. *See also* Michael L. Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 64 (1992) (finding punitive damages necessary to "offset the victim's estate for the lack of compensatory damages received" in wrongful death cases).

Third, fraud is by definition a form of misconduct that is hard to detect. Here, the latent quality of the disease compounded the difficulty in discovering the fraud. Only upon diagnosis, shortly before Williams died, was the fraudulent nature of Philip Morris's enterprise revealed.

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[17] The leading law and economics scholars uniformly agree that "systematic underdeterrence" is likely in wrongful death cases because of the focus on survivors' losses and not the value of the life lost. Polinsky & Shavell, 111 HARV. L. REV. at 941-42; W. Kip Viscusi, *The Social Costs of Punitive Damages*, 87 GEO. L.J. 285, 334 (1998); David S. Haddock, *et al.*, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 44 (1990); Lloyd R. Cohen, *Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action*, 34 EMORY L.J. 295, 331 (1985). *See also Neal v. Farmers Ins. Exch.*, 582 P.2d 980, 992 (Cal. Ct. App. 1978) (acknowledging limitations imposed by wrongful death statutes in matter in which plaintiff died before trial and that otherwise a more substantial compensation would have been recovered, justifying a larger award).

Fourth, this case presents an extreme form of repeated misconduct, inventively renewed and stretched over decades.

Fifth, misconduct motivated by financial gain often requires different considerations than wanton or reckless misconduct. A successful deterrence regime requires that at least some measure of defendant's ill-gotten financial gains be disgorged. *Compare Gilchrist v. Perl*, 387 N.W.2d 412, 416 (Minn. 1986) (recognizing punitive aspect of disgorgement remedy). To achieve optimal deterrence, the profitability of the misconduct must be considered.[18] Dobbs, 40 ALA. L. REV. at 866. Punitive damages that disgorge "ill-gotten profits serve[] to deter future similar conduct by eliminating any profit incentive." *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1081 (Ariz. 1987).

One commentator has found that "[a]t least fifteen states direct the trier of fact to consider profitability." Rachel M. Janutis, *Reforming Reprehensibility: The Continued Viability of Multiple Punitive Damages after State Farm v. Campbell*, 41 SAN DIEGO L. REV. 1465, 1474 n.29 (2004)(citing examples). She also found "[a]t least five states direct a reviewing court to consider the profitability of defendant's misconduct." *Id.* Oregon is one of them. OR. REV. STAT. §§ 30.925(2) (factor for jury); 31.730(2) (reviewing court).

In *Haslip*, this Court endorsed consideration of "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss" because "[t]he application of these standards . . . imposes a sufficiently definite and

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[18] Both the National Conference of Commissions on Uniform State Laws ("NCCUSL") and the Reporters of the American Law Institute ("ALI") recommend that punitive damages for corporate misconduct be tied to profits. *See* NCCUSL, MODEL PUNITIVE DAMAGES ACT, § 7, 14 U.L.A. 124 (Supp. 2003)(approved in 1996); and ALI, REPORTER'S STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 254-55 (1991).

meaningful constraint on the [factfinders'] discretion." 499 U.S. at 22. *See also BMW*, 517 U.S. at 566. Moreover, *Cooper Indus.* expressed no constitutional concern in considering profit in applying the disparity guideline. 532 U.S. at 442.

B. The Profits Derived from this Fraud Require Special Consideration

In this case, Philip Morris's campaign added enormous economic value and collateral benefits to the company. The fraud that helped Williams keep smoking was the cornerstone of the industry's survival strategy for more than 40 years, yielding a staggering 16.25% profit as a percentage of revenue for 1997. Tr. Vol. 14-A at 65-66. It staved off a rapid decline in customers, kept customers smoking while reassuring beginners who then became regular, addicted customers, and reaped enormous profits.

The punitive award in this case hardly approaches Philip Morris's profits, which were more than $2 billion in 1996, the year Williams was diagnosed with lung cancer, and $1.6 billion in 1997, the year Williams died. Tr. Vol. 14A at 55. The $79.5 million awarded represented just two-and-a-half weeks' domestic profit to Philip Morris in 1997. J.A. 336a.

Massachusetts's highest court has adopted the usual formulation with respect to profitability: one criterion for evaluating a punitive damage award "is removal of the profit of an illegal activity [sufficiently large to] be in excess of it so that the defendant recognizes a loss." *Labonte v. Hutchins & Wheeler*, 678 N.E.2d 853, 862 (Mass. 1997).[19]

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[19] *Accord Alexander v. Meduna*, 47 P.3d 206, 219 (Wyo. 2002). *See also Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 460 (Wis. 1980); *Cox v. Stolworthy*, 496 P.2d 682, 690 (Idaho 1972). *Compare* Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 166 (J.H. Burns ed. 1996) (1781) ("the value of the punishment must not be less, in any case, than what is sufficient to outweigh that of the profit of the offence.").

If, however, the assessment of a defendant's profitability were limited to the profit made from an individual plaintiff, underdeterrence would be the inevitable result. Such an atomistic approach to a massive multi-decade fraud utterly undermines the punishment and deterrence rationales for punitive damages and makes them instead part of a business calculus, one in which the public safety will lose time and again. *See Ramirez v. IBP, Inc.*, 950 F. Supp. 1074 (D. Kan. 1996) (citation omitted) ("evaluation of profit is not limited to the particular transaction or incident on which the suit was brought. Rather, it 'involves looking at the defendant's profit from the course of conduct giving rise to the plaintiff's injuries.'").

As Professor Galligan has written, "a rational profit-maximizing actor" considers only those costs it is likely to have to pay and not those it would "never have to pay." Thomas C. Galligan, Jr., *Disaggregating More-than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117, 129 (2003). Thus, when wealth achieved through the very misconduct that merits punitive damages is used to make it difficult to litigate against that defendant, a higher award is not only justified but imperative to vindicate society's interest in deterrence. *See Mathias*, 347 F.3d at 676-77.

In this case, an unrepentant Philip Morris has actually bragged about its successful litigation record and forecasts that it will never have to pay compensation, let alone, punitive damages to other Oregon victims of its fraud. Pet. Br. at 12-13. Yet, their success reflects the use of their far superior financial power to defeat tobacco cases by attrition[20] rather than on the merits, as is well-documented.[21]

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[20] *See, e.g. Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 420-21 (D.N.J. 1993) (calling the strategy employed by tobacco companies "a battle of attrition [in which] the plaintiff will always run out of

Given these litigation tactics that make use of the wealth accumulated by this fraud, a single plaintiff[22] can scarcely afford the cost of protracted and expensive litigation that requires proof of an industry-wide, national fraudulent scheme without insisting on punitive damages that punish wrongdoers for their broader in-state public harm. The "difficulty of detection and less than full enforcement . . . provide strong justifications for efficiency-driven increased or augmented awards." Galligan, 71 TENN. L. REV. at 121.

Here, defendant's misconduct eclipses "particularly egregious" and has resulted in damage that is extremely difficult to assess in monetary terms. That misconduct has not only been repeated, it is an ongoing scheme lasting more than 40 years. That scheme has produced profits beyond most investors' highest expectations, and those profits have enabled Philip Morris to resist justice in the courts by application of sheer economic firepower. All of these factors, in addition to the extreme reprehensibility of Philip Morris's misconduct suggest that this is a case in which a single-digit ratio of punitive to compensatory damages should not be applied and that the jury's punitive damage verdict is not grossly excessive. The award should be upheld.

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ammunition before the Defendants even begin to notice a diminution of their resources.").

[21] Plaintiff directs the Court to the *amicus curiae* briefs filed by Trial Lawyers for Public Justice and the Tobacco Control Legal Consortium for examples of the litigation tactics employed by Philip Morris and the industry to stave off liability and make it too expensive for plaintiffs to pursue cases. *See also* Sara D. Guardino & Richard A. Daynard, *Punishing Tobacco Industry Misconduct: The Case for Exceeding a Single Digit Ratio Between Punitive and Compensatory Damages*, 67 U. PITT. L. REV. 1 (2005).

[22] Tobacco litigation has generally not been found to qualify for class-action treatment, either because individual causation issues predominate or because separate adjudications would not be dispositive of others' interests. *See, e.g., In re Simon II Litig.*, 407 F.3d 125 (2nd Cir. 2003); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Engle v. Liggett Group, Inc.*, __ So.2d __, 2006 WL 1843363 (Fla. Jul. 06, 2006).

IV. Due Process Does Not Prohibit Consideration of Harm to Non-Parties

Though it was hardly the exclusive consideration that the Oregon Supreme Court used to uphold the size of the jury's verdict in this case,[23] the court did describe the full impact of Philip Morris's misconduct on others in Oregon, noting that "Philip Morris does not contest how the Court of Appeals summarized the record." Pet. App. 8a n.1. That record summary stated that Philip Morris's "'public relations campaign had precisely the effect that [Philip Morris] intended it to have and that it affected large numbers of tobacco consumers in Oregon other than Williams . . . [and] caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but non-fatal health problems with their attendant economic consequences.'" *Id.* at 7a-8a (quoting Court of Appeals).

Philip Morris conflates that consideration of total harm within Oregon and the enormity of the offense with punishment for the thousands of Oregonians also defrauded. The two are not the same. As the California Supreme Court recently acknowledged, "[t]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others." *Johnson v. Ford Motor Co.*, 113 P.3d 82, 92 n.6 (Cal. 2005). Doing so does not conflict with this Court's precedents, which hold that a constitutionally valid award is one "supported by the State's interest in protecting its own consumers and its own economy." *BMW*, 517 U.S. at 572.

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[23] The Court found four of the five aggravating factors of reprehensibility present, Pet. App. at 23a, found that the potential harm, not represented by the small economic damages, was great, *id.* at 29a, and found "extreme" reprehensibility. *Id.* at 33a. All of these support the verdict.

Under that criteria, the Oregon courts did not err and this award is entirely justified.

Rather than mandate an atomistic approach to punitive damages, the cases endorse a precisely focused consideration of the misconduct that is properly measured by the breadth of its effect. While that may include an acknowledgement that others have been or potentially would have been harmed by the misconduct, it does not mean that the allotted punishment was calculated to include punishment for unproven harms visited upon other Oregonians.

Neither history nor this Court's recent precedents require that a State forego this type of consideration of the impact of an egregiously wrongful course of conduct on persons within the State who are not parties to the action.[24] Contrary to the revisionist history that Philip Morris and its *amici* have supplied to this Court,[25] punitive damages traditionally have not been restricted to a compensatory purpose that is blind to the injuries caused others who might have the same claim. Instead, decision after decision before and after the ratification of the Fourteenth Amendment have discussed the broader public purposes served by punitive damages, purposes that Philip Morris

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[24] *See also Fritzmeier v. Krause Gentle Corp.*, 669 N.W. 699, 710 (S.D. 2003) (appropriate to consider not only "the defendant's actions as it related to potential harm that may be inflicted on not only the present victim, but also other victims if it was not deterred"); *Planned Parenthood of Columbia, Inc. v. Am. Coal. Life Activists*, 300 F. Supp. 2d 1055, 1060 & n.3 (D. Wash. 2004); *Durham v. Vinson*, 602 S.E.2d 760, 766 n.6 (S.C. 2004); *Myers v. Workmen's Auto Ins. Co.*, 95 P.3d 977, 991 (Idaho 2004).

[25] Philip Morris has supplemented its own treatment of history by referring the Court to the ATRA *amicus* brief, which purports to be an extensive treatment of the same history. That brief throws down the gauntlet by asserting that "not one case" prior to 1870 approved an award that "reflected harm to parties not before the court." ATRA Br. at 2, 16. Plaintiff has attached an Appendix to this brief detailing the large number of cases that ATRA overlooked.

would deny. Although misconduct that injured many in the same way and gave rise to the same cause of action was rare, courts did not hesitate to award punitive damages based on the entire harm that was or could have been caused. Nor has any of this Court's recent punitive-damage jurisprudence denied a State the authority to punish a defendant's entire course of misconduct, including in its assessment the adverse effects on the consumers and the State's economy.

A. History Teaches that Punitive Damages Vindicate Society's Interests in Deterring and Punishing Dangerous and Fraudulent Misconduct

Philip Morris and *amicus* ATRA advance a radically revisionist view of history, arguing that cases that predate the 14th Amendment's ratification in 1868 demonstrate that Due Process forbids awarding punitive damages for a mass tortfeasor's entire course of conduct, including its actual and potential effects on non-parties.[26]

Remarkably, in pressing these arguments, Philip Morris and ATRA cite few cases before 1868.[27] A careful review of pre-ratification caselaw (partially summarized in the attached Appendix), undercuts rather than supports defendant's claims. The cases make plain that by 1868 this Court and the vast majority of state appellate courts had concluded that punitive damages served the public's

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[26] Reliance on history is appropriate because, 1868 marks the "crucial time" for assessing whether a particular practice accorded with Due Process. *Burnham v. Sup. Ct. of Calif.*, 495 U.S. 604, 611 (1990); ATRA Br. at 4.

[27] Philip Morris cites a few such cases, Pet. Br. at 18, 19, 36, relying instead primarily on ATRA, *id.* at 19, n.7, and the latter's claim that its ostensibly exhaustive search of pre-ratification cases "reveals *not a single instance* in which a court approved a punitive damages awards that reflected harm to [non-]parties." ATRA Br. at 16 & n.13 (emphasis in the original).

interest in punishment and deterrence, rather than the plaintiff's interest in compensation. As Justice Baldwin, sitting on circuit, explained, "vindictive or exemplary damages may be given to *indemnify the public* for past injuries and damages, and to *protect the community* from future risks and wrongs." *Bishop v. Stockton*, 3 F. Cas. 453, 454 (Baldwin, Cir. J., C.C. Pa. 1843)(emphasis added), *aff'd*, 45 U.S. 155 (1846).[28] Plainly, the entire course of misconduct was always part of the calculus.

Philip Morris seeks to resuscitate the debate between Theodore Sedgwick, the leading scholar of the day on damages, and Simon Greenleaf, an evidence scholar, that was over by 1868. The Appendix shows, however, that nearly every state that allowed punitive damages looked favorably upon Sedgwick's formulation that exemplary damages "blend[] together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender." 1 Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES 53 (7th ed. 1880). Although Greenleaf argued that punitive damages were simply added compensation,[29]

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[28] *See also Conrad v. The Pacific Ins. Co.*, 31 U.S. 262, 272-73 (1832)(in awarding exemplary damages, "the jury may not only take into view what is due to the party complaining, but to the public"); *Seymour v. McCormick*, 57 U.S. 480, 489 (1853)("exemplary damages" do not "recompense the plaintiff, but . . . punish the defendant."); *Stimpson v. The Railroads*, 23 F. Cas. 103, 104 (Grier, Cir. J. 1847); *Parker v. Corbin*, 18 F.Cas. 1122, 1122 (McLean, Cir. J. C.C.D. Ohio 1848).

[29] Philip Morris and each of its *amici* rely on Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 615 (2003), who, in turn relies primarily on secondary sources (including AM.JUR. and A.L.R.) in arguing that punitive damages were nothing but "additional compensation" for intangible injuries. Other scholars see "serious difficulties" in Colby's theory, finding it most likely "distorted and wrong," Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 142, 143 (2005), and finding it unsupported by the relevant 19th century cases. *See* Anthony J. Sebok, *What Did Punitive Damages Do? Why*

contemporary courts and the court of history overwhelmingly accepted Sedgwick's views.[30]

This Court and the courts of 27 of the 37 states in the Union before ratification agreed that exemplary damages *punished* past misconduct as a way of *deterring* future misconduct, *i.e.*, "to indemnify the public for past injuries and damages, and to protect the community from future risks and wrongs." *Bishop*, 3 F. Cas. at 454. *See* note 4 *supra*.[31]

Misunderstanding the History of Punitive Damages Matters Today, 78 CHI-KENT L. REV. 163, 181-204 (2003). Indeed, many courts held that punitive damages went "beyond a mere compensation for the actual loss or injury," *Dibble v. Morris*, 26 Conn. 416, 1857 WL 969, at *9 (1857). *See also Day*, 54 U.S. at 371; *Conrad*, 31 U.S. at 272-73; *Hendrickson v. Kingsbury*, 21 Iowa 379, 1866 WL 321, at *3 (1866); *Donnelly v. Harris*, 41 Ill. 126, 1866 WL 4550, at *2 (1866); *Hootman v. Shriner*, 15 Ohio St. 43, 46-47 (1864); *Nye v. Merriam*, 35 Vt. 438, 1862 WL 2609, at *2 (1862); *Pike v. Dilling*, 48 Me. 539, 1861 WL 1691, at *3 (1861).

[30] Indeed, "[s]ince the time of the controversy between . . . Greenleaf and Sedgwick . . . , a large majority of the appellate courts in this country have followed . . . Sedgwick." *Hendrickson*, 1866 WL 321, at *3. *Accord Peshine v. Shepperson*, 58 Va. (17 Gratt.) 472, 1867 WL 2892, at *10 (1867); *Gaither v. Blowers*, 11 Md. 536, 1857 WL 3817, at *9 (1857). These courts rejected Greenleaf precisely because his "extreme views . . . are not justified by the authorities, and are well refuted by Sedgwick," *Frink & Co. v. Coe*, 4 Greene 555, 1854 WL 228, at *3 (1854); they preferred Sedgwick's teachings because his "'conclusions . . . are well warranted by the decisions.'" *Towle v. Blake*, 48 N.H. 92, 1868 WL 2266, at *6 (1868)(quoting "Vol. 1, of Chancellor Kent's Com. 618"). This also represented the consensus view even 50 years later. 11 J.G. Sutherland, A TREATISE ON THE LAW OF DAMAGES, § 393, at 1284 n.62 (4th ed. 1916).

[31] *See also N.O., J. & G.N.Ry. Co. v. Hurst*, 7 George 660, 1859 WL 5326, at *6 (Miss. Er. App. 1859). Pre-ratification courts identified the relevant State interest concerns as ensuring public safety, *see Bishop*, 3 F. Cas. at 454-55; *Pickett v. Crook*, 20 Wis. 358, 1866 WL 2763, at *1 (1866); *Chi. & Rock Is. R.R. Co. v. McKean*, 40 Ill. 218, 1866 WL 4459, at *15 (1866); *Polk, Wilson & Co. v. Fancher*, 38 Tenn. 336, 1858 WL 2918, at *1, *2-*3 (1858); *Manderson v. Comm. Bank*, 28 Pa. 379, 1857 WL 7384, at *4 (1857); and preserving peace and forestalling violent self-help remedies. *See N.O., J. & G.N. Ry. Co. v. Bailey*, 40 Miss. 395, 1866 WL 1889, at *6 (1866); *Hawk v.*

The size of a punitive damages award was given in light of the "enormity of the offense," *Day*, 54 U.S. at 371, and "proportioned to the degree of negligence or wantonness shown," *Pickett v. Crook*, 20 Wis. 358, 1866 WL 2763, at *1 (Wis. 1866); *see also Dibble*, 1857 WL 969, at *9 (Conn. 1857); or "to the character . . . and the circumstances of aggravation." *Peshine*, 1867 WL 2892, at *8.[32]

Tellingly, ATRA completely misconstrues two of the fives cases it cites for its most crucial claim. Read correctly, these cases, and four others that also involve solitary plaintiffs who were injured by mass transportation companies, undercut rather than support Philip Morris's revisionism.

For example, ATRA asserts that *Hopkins v. Atlantic & St. Lawrence R.R.*, 36 N.H. 9, 1857 WL 2820 (N.H. 1857), illustrates the proposition that courts never "consider[ed]" harm to anyone but the plaintiff in the "calculation of exemplary award[s]." ATRA Br. at 19 n.15. In reality, the New Hampshire Supreme Court, affirming punitive damages awarded to the husband of a single passenger injured in a railroad accident, emphasized the broader public interest at stake in justifying punitive damages cases, explaining that:

> [i]f a serious personal injury happens to a [single] passenger, by gross negligence in the management of a railroad train, it is difficult to suggest a case where the public interest would more loudly call for an exemplary verdict. *It is a subject in which all the traveling public are deeply interested.*

Ridgway, 33 Ill. 473, 1864 WL 2956, at *1 (1864); *Champion v. Vincent*, 20 Tex. 811, 1858 WL 5406, at *5 (1858).

[32] *See id.* at 10. *See also Stimpson*, 23 F.Cas. at 104; *City of Chicago v. Martin*, 49 Ill. 241, 1868 WL 5212, at *1 (1868); *Phelin v. Kenderdine*, 20 Pa. 354, 1853 WL 6203, at *6-*7 (1853).

1857 WL 2820, at *7-8 (emphasis added).

ATRA also cites *Frink & Co. v. Coe*, 4 Greene 555, 1854 WL 228 (Iowa 1854). ATRA Br. at 19, n.15. That case involved an action for injury sustained by a single passenger when a stagecoach overturned. The Iowa Supreme Court held that because "stage proprietors are bound to use the greatest care for the safety of passengers" as a group, individual passengers injured through a defendant's gross neglect may seek punitive damages in excess of the individual's injuries. 1854 WL 228, at *3. [33] These cases consider the scope of the defendant's misconduct and its impact on the broader public, just as the Oregon Supreme Court did in this case.

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[33] Four other cases involving common carriers illustrate that pre-ratification courts were sensitive to the hazards posed to the public by fraudulent or reckless companies and were keen to uphold punitive damages awards that exceeded a plaintiff's actual injuries in order to punish the full breadth of the misconduct. *See Smyrna, Leipsic & Phila. Steamboat Co. v. Whilldin*, 4 Del. (4 Harr.) 228, 1845 WL 479 (Del. Super. Ct. 1845)(in steamboat collision case, the Chief Justice instructed the jury that punitive damages may be awarded because "a reckless disregard of human life deserv[ed] the severest punishment," *especially in light of "the defendant's knowledge of the number of passengers" on board* the plaintiff's ship. 1845 WL 479, at *5 (emphasis added); *Bishop*, 3 F.Cas. at 454 (in a case involving an overturned stagecoach, Justice Baldwin charged the jury that "[c]ontracts for carrying passengers are made not only with the party to the transaction, but they are also made with the public," and thus punitive damages are appropriate if an individual's "private loss or injury . . . ha[d] been occasioned by such negligence, unskilfulness or recklessness as concerns the safety of the traveling public" as a whole. *Id.* at 455); *Chi. & Rock Island*, 1866 WL 4459, at *15 (punitive damages available against a railroad for one passenger's injuries in order to further "the protection of the public."); *Brickell v. Frisby*, 2 Rob. 204, 1842 WL 1659, at *2 (La. 1842)(reversing a defense judgment because "[i]t is time that those who are interested in th[e] [transportation] business should be taught by exemplary damages . . . that they cannot sport with impunity with the lives of those who . . . trust to their skill and prudence; and that if they employ intemperate and reckless men in the management of their boats, they must take the consequences.").

History does not support Philip Morris's claims; in fact, it demolishes them.

B. Modern Cases Do Not Proclaim a Due Process Bar to Punishing a Defendant for its Harm to a State's Populace

Philip Morris bases much of its argument on this Court's statement in *State Farm* that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." Pet. Br. at 10, quoting *State Farm*, 538 U.S. at 423. In doing so, defendant misunderstands both what the Oregon Supreme Court did in this case and assigns the quoted passage with a weight it cannot bear.

The Oregon Supreme Court did not use harm to others to adjudicate the merits of any case other than the claims of this plaintiff. It did not multiply compensatory damages by the number of presumptive victims, even as *BMW* suggested could be done. It read *State Farm* to prohibit consideration of non-parties in analyzing the ratio. Pet. App. 30a-31a. Instead, the court considered the undisputed impact of Philip Morris's uniform fraud directed at the entire Oregon public[34] and maliciously injuring a significant number of its customers, including Williams, in its reprehensibility analysis, *id.* at 31a, as *State Farm* authorized. 538 U.S. at 427. After doing so, it concluded that Philip Morris's misconduct was "extreme and outrageous." Pet. App. 33a. Particularly because of the nature of this fraud, an expansive view of the public harm produced is appropriate.

Such a view is consistent with the broader public purpose served by punitive damages, which enables them to take into account harm to others. The Ohio Supreme Court, for example, stated the underlying principle as recognizing

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[34] Philip Morris did not contest the Court of Appeals summary of the record. Pet. App. 8a, n.1.

that while the "plaintiff remains a party, but the de facto party is our society." *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 104, 781 N.E.2d 121, 145 (Ohio 2002) (upholding a $30-million punitive award against a health insurer for cutting off medical payments to a woman who died of cancer). That award was upheld upon consideration of the "industry's central role in the lives of so many Ohioans," even though the misconduct before the court affected no one else. *Id.* at 103, 781 N.E.2d at 144.

By recognizing the plenary authority of States to set the scope and reach of punitive damages, *see* Section II, *supra*, at 20, this Court has endorsed the public-purpose approach under which a constitutionally valid award is one "supported by the State's interest in protecting its own consumers and its own economy." *BMW*, 517 U.S. at 572. Thus, for example, the *BMW* Court acknowledged that the "error-free portion" of the jury's verdict in that case, properly could have multiplied the lost value in the refinished cars ($4,000) by the number of affected consumers. *Id.* at 567 n.11. The error was in using a nationwide number of 1,000 as the multiplier, rather than the 14 refinished cars sold in Alabama, which would have produced an "award of $56,000." *Id.* This Court did not require that the validity of the other claims be adjudicated or that others be joined in that lawsuit.

Thus, not by implication, but by authoritative application, this Court authorized consideration of the impact of the misconduct on non-parties in calculating the appropriate punitive damage award. As one commentator observed, the "Court appeared to recognize that Alabama's interest was not tied only to Dr. Gore as the named plaintiff. Instead, Alabama was said to have punishment and deterrent-based interests related to other BMW customers in Alabama as well as in the state's economy more generally." Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 17 (2004).

State Farm marked no retreat from *BMW's* approval of this approach. In *State Farm*, this Court chastised the plaintiffs for failing to show any "conduct by State Farm similar to that which harmed them." 538 U.S. at 424. At another point in the opinion, this Court said there was "scant evidence" of similar misconduct. *Id.* at 423. If there had been any such evidence, the decision implied, it would have been appropriate to consider it in setting the punitive damages. That is, in fact, how the Utah Supreme Court read this Court's mandate. On remand, the Utah court said the decision permitted a harsher punishment based on "our concern that State Farm's defiance strongly suggests that it will not hesitate to treat its Utah insureds with the callousness that marked its treatment of the Campbells." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2005 UT 34, 35, 98 P.3d 409, 417-18, *cert. denied*, 543 U.S. 874 (2004). In setting punitive damages for this much more modest injury and record of reprehensibility at $9 million, Utah considered potential future harm to others in Utah. *Id.*, 98 P.3d at 416.

Professor Sharkey gives the passage Philip Morris quotes a somewhat different reading. She writes, a "more contextualized and nuanced reading of the opinion . . . suggests that the Court was primarily concerned with limiting the extraterritorial or out-of-state reach of punitive damages." Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 350 (2003). Why else, she asks, would this Court have discussed "'harm to the people of Utah,' at least in cases where such an 'adverse effect on the State's general population' could be shown?" *Id.*, quoting *State Farm*, 538 U.S. at 427. She correctly concludes that, under *State Farm*, "assessment of [punitive] damages to compensate for widespread harm may be appropriate--or at least constitutional--so long as it occurs within the confines of a single state." Sharkey, 113 YALE L.J. at 350; *see id.* at 362.

C. The Issue of Multiple Punitive Damage Awards is Not Present in this Matter

Philip Morris complains that Oregon law "creates the possibility of multiple punitive damage awards for the same conduct," and even "affirmatively promotes" duplicative awards, Pet. Br. at 10 & 11. Their complaint, however, is little more than a hypothetical possibility. Defendants have raised the specter of potentially unfair duplicative awards ever since Judge Friendly mentioned the possibility in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967). In reality, such awards appear to be rare. Neither Philip Morris nor its supporting *amici* cite a single example.

The jury's 1999 verdict in this case stands as the sole Oregon punishment levied against Philip Morris. The only other case in the Oregon courts where a jury awarded punitive damages against them was in a case involving a separate fraud in its marketing of "light" cigarettes, conduct completely different than that in this case. That award was vacated on the basis of instructional error. *Estate of Schwarz v. Philip Morris, Inc.*, 206 Or. App. 20, 135 P.3d 409 (2006).

Professor Cordray has suggested that the multiple punitive damage issue poses a "potential for either overdeterrence or underdeterrence." Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 279 (1999). Oregon has responded to this problem with dual statutory protections. Both juries (OR. REV. STAT. §§ 30.925(2)(g)) and reviewing courts (§ 31.730(2)) are separately required to take into account the "total deterrent effect" of other punishments imposed for the same misconduct. The Court of Appeals found this protection ensures that "any future award [will be adjusted] to account for this one." J.A. 66a-67a.

In addition, OR. REV. STAT. § 31.730(3) provides that "the court *shall* consider the amount of any previous judgment for punitive damages entered against the same defendant

for the same conduct." (emphasis added). These protections are available to Philip Morris when the time is ripe.

V. Denial of Philip Morris's "Proportionality" Jury Instruction Did Not Violate Due Process

Philip Morris claims that the trial court's failure to give its proffered "proportionality" jury instruction violated Due Process. That claim is procedurally and substantively untenable. Not only did Defendant's proposed instruction fail to meet minimum state requirements for accuracy and clarity, but Philip Morris told the trial court that the jury need not be instructed on proportionality and that the issue could instead be fully considered during post-verdict review. Philip Morris may not now claim that the refusal to give its instruction requires reversal. Defendant's proposed instruction was self-contradictory and wrong on the law, but if rejection of the substance of the instruction was error at all, the error was both invited and harmless.[35]

A. The Trial Court Was Not Required to Give Erroneous and Self-Contradicting Instruction

Philip Morris is wrong about whether harm to non-parties can be considered in measuring punitive damages. *See* Section IV, *infra*, at 35. Even if it were correct, no precedent requires or even suggests that a jury must be instructed in the fashion that Philip Morris now insists is necessary. In fact, although proportionality was discussed in both *BMW* and *State Farm*, the only mention of any mandatory jury instruction is found in *State Farm*, which

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35 "Most constitutional errors" are a form of "trial error" subject to harmless-error analysis. *See United States v. Gonzales-Lopez*, 126 S.Ct. 2557, 2563-64 (2006) (relying upon *Arizona v. Fulminante*, 499 U.S. 279 (1991)). Where there is "careful appellate weighing," even in the context of a criminal death-penalty case where concerns for unconstitutional deprivations should be heightened, "an appellate court's proportionality review" is generally sufficient to meet constitutional objections. *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990).

held that a jury must be advised that "it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422.

There is no merit to Philip Morris's new argument that an instruction on "proportionality" can somehow be extrapolated from *State Farm's* mandate to instruct against considering lawful *extraterritorial* conduct.[36] Pet. Br. at 23. In fact, *State Farm* said that application of the *BMW* guidelines, which include the proportionality principle, is a task for the trial court and that the *de novo* review conducted by an appellate court is "of a trial court's application of them to the jury's award." *State Farm*, 538 U.S. at 418.

A "request for an instruction may properly be denied, without error, unless the requested instruction is clear and correct in all respects, both in form and in substance, and unless it is altogether free from error." *Beglau v. Albertus*, 536 P.2d 1251, 1256 (Or. 1975) (citations omitted). Philip Morris's proposed instruction, which covered three-and-a-half pages and is quoted in part here, conflicted with the governing state law:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. *Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is*, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which

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[36] One cannot infer from the fact that proportionality is one of three punitive damages *BMW* guideposts that the jury should be instructed on it. While juries are told told that the reprehensibility of a defendant's misconduct is central to the punitive damage calculus, the third factor, comparability, cannot practically be the subject of a jury instruction.

> other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

J.A. 280a (emphasis added; pagination omitted).

The proposed instruction also would have told jurors that they "may . . . consider the defendant's financial condition as part of the process of arriving at an appropriate punishment," J.A. 281a, but "must not allow [their] decision to be influenced by the defendant's financial condition," J.A. 280a.[37]

Plainly, the instruction would have told the jury not to punish Philip Morris for the impact of its misconduct on other persons while also instructing the jury *to consider* that impact in determining the reasonable relationship between the punishment and the harm to Williams. It would also have told the jury both to consider *and* not to consider Philip Morris's financial condition. Defendant's proposed instruction thus resembled the directions Dorothy received from the scarecrow in the *Wizard of Oz*, when he pointed in two opposite directions simultaneously.[38]

Harm to others, of course, is a plainly permissible consideration in the reprehensibility calculation, as *BMW*, 517 U.S. at 576-77, and *State Farm*, 538 U.S. at 426-27, both held. Although Philip Morris *now* argues reprehensibility is the only place harm to others may be considered, Pet. Br. at 22, the instruction it offered at trial told the jury to consider harm to others "in determining . . . [the] reasonable relationship;" that is, *in determining proportionality*.

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[37] Philip Morris's argument that it was entitled to a proportionality instruction does not discuss the internal contradictions in its proposed instruction. *See* Pet. Br. at 23-25.

[38] Noel Langley *et al.*, The Wizard of Oz (movie script), *available at http://www.un-official.com/The_Daily_Script/ms_wizoz.htm.*

Every Oregon jurist reviewing Philip Morris's lengthy, confusing, and self-contradictory instruction – the trial court, the unanimous panel for the Court of Appeals, and the unanimous Oregon Supreme Court – found it did not make sense. J.A. 195a; Pet. App. at 18a n.3 & 67a n.15. Philip Morris even concedes that the concept it attempted to convey may be "elusive." Pet. Br. at 23. Certainly, nothing in Defendant's proposed instruction made it any clearer.

B. Due Process Does Not Require A Proportionality Instruction

Philip Morris told the trial court that proportionality "is generally addressed post-judgment – post-verdict, at least, in determining whether the amount of punitive damages is constitutionally excessive." J.A. 191a. When the court asked whether there was any precedent that requires a court to "tell the jury about proportionality," Philip Morris's counsel unequivocally answered, "It has always been addressed post-verdict."[39] *Id.* at 193a.

The court accepted that representation as the usual practice and chose not to vary from it. Considerations of comity suggest that the trial court's refusal to give the instruction is not error. Reflecting the respect due state tribunals, this Court has held that a "federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003). In *Mitchell*, this Court recognized that the state court's decision did not conflict with the reasoning or holdings of prior

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[39] The defense's representation is consistent with the observation of this Court in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437, 440, 436 (2001), where it held that "[t]rial courts and appellate courts seem equally capable of analyzing the second *[Gore,* disparity] factor," and that appellate review of the award's size and constitutionality is *de novo*.

precedent and thus was not "contrary to . . . clearly established Federal law." *Id.*

The Oregon Supreme Court could have justifiably looked no further than this Court's ruling in an earlier case that arose in Oregon. In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), this Court confirmed that post-verdict review of punitive damage awards, rather than jury instructions, provides the most constitutionally significant constraint on a jury's discretion. The Court specifically rejected the argument that detailed jury instructions required by Oregon law adequately constrained the jury's discretion. *Id.* at 433; *see also id.* at 440-43 (Ginsburg, J., dissenting).

Therefore, Oregon's denial of Philip Morris's "proportionality" instruction cannot be regarded as an unreasonable application of federal law that merits reversal. That it was induced by Philip Morris's own representations of the state of the law makes reversal particularly inapt.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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ROBERT S. PECK*
NED MILTENBERG
CENTER FOR CONSTITUTIONAL
LITIGATION, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2809

JAMES S. COON
RAYMOND F. THOMAS
SWANSON THOMAS & COON
621 SW Morrison Street, Suite 900
Portland, OR 97205
(503) 228-5222

WILLIAM A. GAYLORD
GAYLORD EYERMAN BRADLEY PC
1400 SW Montgomery St.
Portland, OR 97201
(503) 222-3526

CHARLES S. TAUMAN
CHARLES S. TAUMAN, P.C.
P.O. Box 19631
Portland, OR 97280
(503) 849-9821

MAUREEN LEONARD
ATTORNEY AT LAW
520 SW Sixth Avenue, Suite 920
Portland, OR 97204
(503) 224-0212

KATHRYN H. CLARKE
ATTORNEY AT LAW
P.O. Box 11960
Portland, OR 97211
(503) 460-2870

*Counsel of Record

Appendix

FEDERAL APPELLATE CASES – *Bishop v. Stockton*, 3 F. Cas. 453, 454-55 (Baldwin, Circuit Justice, C.C. Pa. 1843) (No. 1440), *aff'd*, 45 U. S. (4 How.) 156 (1846) (In an action brought to recover damages for injuries sustained when a stagecoach overturned, the jury was instructed that "the case concerns the public as well as the parties." The court explained that in addition to compensatory damages, "vindictive or exemplary damages may be given to indemnify the public for past injuries and damages, and to protect the community from future risks and wrongs. . . . [T]o justify exemplary damages, the injury must be more than a mere private loss or injury, it must have been occasioned by such negligence, unskilfulness or recklessness as concerns the safety of the traveling public.").

Stimpson v. The Railroads, 23 F. Cas. 103, 104 (Grier, Circuit Justice, 1847) (No. 13,456) (In upholding an award of vindictive damages in a patent infringement case, the court held that "[i]t is a well settled doctrine of the common law, though somewhat disputed of late, that a jury in actions of trespass or tort may inflict exemplary or vindictive damages upon a defendant, having in view the enormity of defendant's conduct rather than compensation to the plaintiff. Indeed in many actions such as slander, libel, seduction, &c. there is no measure of damages by which they can be given as compensation for an injury, but are inflicted wholly with a view to punish, and make an example of the defendants.") (internal citation omitted).

Parker v. Corbin, 18 F. Cas. 1122 (McClean, Circuit Justice, C.C.D. Ohio 1848) (No. 10,731) (In an action for patent infringement, the court held "where the circumstances were of a somewhat aggravated character, what was sometimes called in the law vindictive damages might be given, which would include counsel fees, and something more by way of example to deter others from doing the same thing.").

Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (Grier, J.) (In a trespass action, the court held that it was proper for the trial court to charge the jury regarding the

propriety of punitive damages. "It is a well-established principle of the common law, that in actions of trespass and all actions . . . for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. . . . In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit.").

Seymour v. McCormick, 57 U.S. (16 How.) 480, 489 (1853) ("[W]here the injury is wanton or malicious, a jury may inflict vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant.").

ALABAMA - *Mitchell v. Billingsley*, 17 Ala. 391, 1850 WL 249, at *2 (Ala. 1850) ("It is well settled that . . . in actions of this kind," where the defendant willfully removed fruit trees from plaintiff's property and threatened him with a gun, "the jury are not confined to the actual damage. The law in cases attended with circumstances of aggravation, allows the jury to give exemplary damages.") (citation omitted).

Rhodes v. Roberts, 1 Stew. 145, 1827 WL 506, at *1 (Ala. 1827) (Exemplary damages may be recovered in an action for personal injuries, when the defendant's negligence, in shooting plaintiff, is "very gross and reprehensible").

Sharpe v. Hunter, 16 Ala. 765, 1849 WL 532, at *2 (Ala. 1849) (If a defendant wrongfully prosecutes a suit for a writ of attachment with "malice or intention to vex the defendant" "then vindictive damages may be recovered. . . .") (citations omitted).

Donnell v. Jones, 13 Ala. 490, 1848 WL 426, at *8 (Ala. 1848) (Vindictive damages, exceeding damages for plaintiff's actual injuries, may be sought for malicious prosecution of a writ of attachment); *see also Devaughn v. Heath*, 37 Ala. 595, 1861 WL 443, at *1 (Ala. 1861) (vindictive damages are available for wanton or reckless trespasses on land).

CALIFORNIA - *Dreux v. Domec*, 18 Cal. 83, 86 (Cal. 1861) (affirming punitive damages award of $2,250 for malicious prosecution, and rejecting defendant/appellant's contention that the trial court erred by instructing the jury that if they "believe the defendants prosecuted plaintiff maliciously and without probable cause, they are at liberty in assessing the damages to go beyond the actual injury sustained, and give exemplary damages").

Wilson v. Middleton, 2 Cal. 54, 54 (Cal. 1852) (Vindictive damages may be given in a civil action for a personal injury, even if the act is punishable by a criminal prosecution).

CONNECTICUT - *Bartram v. Stone*, 31 Conn. 159, 1862 WL 680, at *3 (Conn. 1862) ("[F]or a premeditated malicious battery larger damages ought to be awarded than for a personal injury resulting rather from accident than design, or produced by unjustifiable and immediate provocation from the injured party. Our courts have never adopted the rigid rule contended for by the [defendant's] counsel, that no more than the actual damage done to the plaintiff by a battery or any other trespass should ever be recovered by

him. Exemplary damages have been allowed in proper cases from the first institution of courts among us.")

Dibble v. Morris, 26 Conn. 416, 1857 WL 969, at *9 (Conn. 1857) ("By a series of decisions in this state, it is settled that in actions sounding in tort, where the injury was inflicted wantonly or maliciously, the jury are at liberty to give, and it is proper for them to give, damages beyond a mere compensation for the actual loss or injury, and exemplary or vindictive in proportion to the degree of malice or wantonness evinced by the defendant.") (citations omitted).

Linsley v. Bushnell, 15 Conn. 225, 1842 WL 510, at *9 (Conn. 1842) ("There is no principle better established, and no practice more universal, than that vindictive damages, or smart money, may be, and is, awarded, by the verdicts of juries, in cases of wanton or malicious injuries, and whether the form of the action be trespass or case.").

Churchill v. Watson, 5 Day 140, 1811 WL 1056, at *3 (Conn. 1811) (ordering a new trial where court erred by allowing only compensatory damages and rejecting evidence in support of punitive damages, and holding "In addition to the actual damage which the party sustains, in actions founded in tort, the jury are at liberty to give a further sum, which is sometimes called *vindictive*, sometimes, *exemplary*, and at other times, *presumptive* damages. These, from their nature, cannot be governed by any precise rule; but are assessed by the jury, upon a view of all the circumstances attending the transaction. It ought, therefore, to have been admitted in evidence, and the jury ought to have taken into consideration, in assessing the damages, that the taking by the defendant, was malicious, and with intent to obstruct the plaintiff, and to prevent the building of his vessel; and all the circumstances attending the transaction, ought to have been heard and considered. If the defendant, in a quarrelsome manner, had interfered with the building of the vessel, and by threats, had attempted to induce the plaintiff to desist, and failing in this, and knowing that no other spar could be obtained, and with a

view to prevent the building of the vessel, had taken it away forcibly, or wantonly destroyed it, a jury might give a larger sum in damages, than they would do, had it been taken under a mistaken apprehension of the rights of the parties.") (emphasis in original).

DELAWARE - *Smyrna, Leipsic & Phila. Steamboat Co. v. Whilldin*, 4 Del. (4 Harr.) 228, 1845 WL 479, at *5 (Del. Super. Ct. 1845) (In a trespass action, one steamboat passenger alleged that the captain of another steamboat intentionally steered the second boat into the first, causing it to sink. The court held that "[d]amages are in the discretion of the jury. If the jury think that this boat was run into by captain Whilldin, willfully and designedly, they would be justified in awarding vindictive damages to any amount which, in the exercise of a sound judgment and discretion, they deem proper, by way of public example. Considering the time; the occasion; the defendant's knowledge of the number of passengers; a wilful sinking of the *Kent* would evince a reckless disregard of human life deserving the severest punishment.").

Jefferson v. Adams, 4 Del. (4 Harr.) 321, 1845 WL 511, at *2 (Del. Super. Ct. 1845) ("[I]n actions of trespass for wilful injuries the jury might . . . give damages by way of punishment, and beyond a mere compensation of the actual injury. It was for the jury to say whether there were circumstances of aggravation in this case, which ought in their judgment, to require a departure from the general rule of compensatory damages; and which called on them to add any thing by way of public example or punishment.").

Kinney v. Hosea, 3 Del. (3 Harr.) 397, 1842 WL 523, at *4 (Del. Super. Ct. 1842) (In a tort suit "if [the defendant] was actuated by actual or express malice, this would aggravate the case, and make him liable to exemplary damages in the discretion of the jury, by way of punishment for such an outrage, and as an example to deter others.").

Parke v. Blackiston, 3 Del. (3 Harr.) 373, 1841 WL 405, at *3 (Del. Super. Ct. 1841) ("Compensatory damages are for wounded feelings, time lost, and money expended in the suit. Exemplary damages, to warn the [wrongdoer] that he is violating the laws of the land; to close his mouth; to protect society, and secure it from the use of the pistol and bowie knife, by an assurance that the law will avenge all wrongs, and that private vengeance is unnecessary. Society is always wounded when any of its members are injured; and in a glaring case like this it needs to be avenged by a verdict which shall punish the daring violator of its peace.").

GEORGIA – *Kendrick v. McCrary*, 11 Ga. 603, 1852 WL 1363, at *4 (Ga. 1852) (In affirming a father's award of $1,000 in vindictive damages – in comparison to only $49 in actual damages – for the seduction of his daughter, a unanimous state supreme court explained, "It has been truly said, that more instructive lessons are taught in Courts of Justice, than the Church is able to inculcate. Morals come in the cold abstract from the pulpit; but men smart under them practically, when Juries are the preachers.").

ILLINOIS – *Foote v. Nichols*, 28 Ill. 486, 1862 WL 3347, at *2 (Ill. 1862) (In a trespass action for assault and battery, the trial court correctly instructed the jury that if the evidence established that "the defendant assaulted the plaintiff without provocation, and that such assault was an aggravated one, and that the public good, or justice to the plaintiff, or both, demand it, then the law is that they are not confined in their verdict to actual damages proven, but may give exemplary damages not only to compensate the plaintiff, but to punish the defendant for such wanton injury. . . . In such a case, the jury may go beyond mere compensation to the plaintiff, and admonish the defendant and all others in the same way inclined, that the peace of society is not to be thus violated with impunity."). *See Ously v. Hardin*, 23 Ill. 403, 1860 WL 6267, at *1 (Ill. 1860) ("[I]t is a well settled common law principle, that in actions for torts to the person, and in malicious torts to property, the jury may

give smart money in the shape of heavy damages, not as compensation alone for the injury received, but as punishment to the defendant who did the wrong; hence they are sometimes called punitory or punitive damages."); *Smith v. People*, 25 Ill. 17, 1860 WL 6489, at *3 (Ill. 1860) ("The law does not punish criminally every unlawful act, although it may be a grievous offense to society." Instead, there are "numerous instances" in which offenses "which are not by law punishable as crimes, but which are unlawful as violative of the rights of individuals and for which the civil law will afford a remedy to the injured party, and will at the same time and by the same process punish the offender for the wrong and outrage done to society, by giving exemplary damages, beyond the damages actually proved.").

Chi. & Rock Island R.R. Co. v. McKean, 40 Ill. 218, 1866 WL 4459, at *15 (Ill. 1866) (In an action for personal injuries, punitive damages may be awarded because "the case of a railroad train running regardless of law, demands, at the hands of a jury, something more in the way of damages, than a mere individual, and this for the protection of the public.").

See Donnelly v. Harris, 41 Ill. 126, 1866 WL 4550, at *2 (Ill. 1866) (Vindictive damages are available to "inflict[] damages beyond the injury actually received by the plaintiff . . . [if] the evidence shows deliberate malice, a vindictive spirit, or a reckless disregard for the personal security of another, and the person committing the wrong does so to gratify his malice, the law has always authorized a jury to give smart-money, as a kind of punishment for the aggravated wrong.").

Sherman v. Dutch, 16 Ill. 283, 1855 WL 5413, at *3 (Ill. 1855) (In a trespass action for the theft, conversion, and destruction of property, "the plaintiff may recover, not only for the pecuniary loss sustained, as the natural and legal consequence of the trespass, but he may recover vindictive or exemplary damages, in consideration of the circumstances attending the wrongful act, the malice,

willfulness, wantonness or corrupt motive attending the act. . . . It was proper that the jury should be informed of the character of the property taken, the use to which it was appropriated and adapted, the consequences that would follow from its removal, the manner of its removal, and the circumstances generally attending the act, for the purpose of determining upon its value, and also upon the motives governing the defendants. If that motive was to gratify revenge, to break up a newspaper obnoxious to them, or to oppress the plaintiff under the color of law, exemplary damages would be proper, such as would serve as an example to others.").

INDIANA –*Miles v. Wingate*, 6 Ind. 458, 1855 WL 3604, at *1 (Ind. 1855) (Where a plaintiff in an action for the continuance of a nuisance had previously obtained a judgment against the defendant for the same nuisance, plaintiff was entitled to exemplary damages as "[e]very continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie; and very exemplary damages will probably be given, if after one verdict against the defendant he has the hardiness to continue it.") (citations omitted).

Anthony v. Gilbert, 4 Blackf. 348, 1837 WL 1897, at *1 (Ind. 1837) (In a trespass action for taking and carrying away personal property, not only is "[t]he assessment of damages . . . a matter which must be, unavoidably, in a great measure left to the discretion of the jury," but "[i]t is proper for them to take into consideration all the circumstances under which a trespass may have been committed; and wherever malice, insult, or deliberate oppression, has been an ingredient in the wrongful act, to award, in addition to the actual loss sustained, such exemplary damages as shall tend to prevent a repetition of the injury.").

IOWA – Hendrickson v. Kingsbury, 21 Iowa 379, 1866 WL 321 at *7 (Iowa 1866) (In a successful action for compensatory and exemplary damages against a defendant, the court stated that "the damages allowed in a civil case by

way of punishment, have no necessary relation to the penalty incurred for the wrong done to the public: but are called punitive damages by way of distinction from pecuniary damages, and to characterize them as a punishment for the wrong done to the individual. In this view, the awarding of punitive damages can in no just sense be said to be in conflict with the constitutional or common law inhibition against inflicting two punishments for the same offense."). *See also Garland v. Wholeham*, 26 Iowa 185, 1868 WL 310 (Iowa 1868) (affirming a punitive damages award, "in addition to the actual value of the property destroyed," as punishment for the defendant's malicious killing of the plaintiff's horses).

Frink & Co. v. Coe, 4 Greene 555, 1854 WL 228, at *3 (Iowa 1854) (In an action for injury sustained by a passenger when a stage coach overturned, the jury awarded compensatory and punitive damages. In affirming that award, the court upheld the jury instruction, which advised that because stage coach proprietors "carry passengers for hire and compensation, [they] are responsible for all accidents and injuries happening to the persons of the passengers." Indeed, the court explained, because "stage proprietors are bound to use the greatest care for the safety of passengers," individual passengers who are injured through a defendant's gross neglect are entitled to punitive damages, damages in excess of the plaintiff's injuries. In so holding, the court expressly rejected Greenleaf's views and ratified Sedgwick's.). *See also Williamson v. W. Stage Co.*, 24 Iowa 171, 1867 WL 293, at *1 (Iowa 1867) (exemplary damages may be given in cases of fraud, malice, gross negligence, or oppression).

KENTUCKY - *Parker v. Jenkins*, 66 Ky. (3 Bush) 587, 1868 WL 4007, at *3 (Ky. 1868) (In cases of "trespass or torts, accompanied by oppression, fraud, malice, or negligence so gross as to raise a presumption of malice, the jury have discretion to award exemplary or vindictive damages - in all other cases of civil injury or breach of contract, the object is

to give compensation to the party injured for the actual loss sustained.") (citation omitted).

Slater v. Sherman, 68 Ky. (5 Bush) 206, 1869 WL 6800, at *5 (Ky. 1868) ("Although there is some conflict of authority on the question, it may be regarded as settled in this State, and, as we think, in accordance with principle and the weight of authority, that a plaintiff may recover vindictive or punitive damages for personal injuries, where the commission of the act complained of is accompanied with circumstances of aggravation.").

Bd. of Internal Improvement of Shelby County v. Scearce, 63 Ky. (2 Duv.) 576, 1864 WL 2586, at *2 (Ky. Ct. App. 1864) (upholding statute stating that "if the life of any person or persons is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid.") (citation omitted).

LOUISIANA – *Brickell v. Frisby*, 2 Rob. 204, 1842 WL 1659, at *2 (La. 1842) (In an action by the owners of one steamboat to recover damages from the owners of a second, which caused the two boats to collide on the Mississippi River, due to gross negligence of the officers and crew of the latter boat, the court reversed the judgment and remanded, ordering that "[i]t is time that an example should be made. It is time that those who are interested in this [transportation] business should be taught by exemplary damages, if they cannot be reached in any other way, that they cannot sport with impunity with the lives of those who, from necessity, trust to their skill and prudence; and that if they employ intemperate and reckless men in the management of their boats, they must take the consequences.").

MAINE – *Pike v. Dilling*, 48 Me. 539, 1861 WL 1691, at *3 (Me. 1861) (In a trespass action for maiming and disfiguring

the plaintiff, the court upheld a punitive damages award and rejected the defendant's claim that the trial court erred by instructing the jury that "in such case, they were authorized, if they thought proper, in addition to the actual damages the plaintiff has sustained, to give him a further sum, as exemplary or vindictive damages, both, as a protection to the plaintiff, and as a salutary example to others, to deter them from offending in like cases." Quoting *Day v. Woodworth*, the court reasoned that "'It is a well established principle of the common law that, in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence, rather than the measure of compensation to the plaintiff.' This statement of the law was in perfect conformity with the previous decisions which had received the sanction of th[is] Court, . . . 'as well in the English as in the American courts of justice, that, in actions for injuries to the person, committed under the influence of actual malice, or with the intention to injure the plaintiff, the jury may, in their discretion, give such damages beyond the actual injury, for sake of the example, – damages not only to recompense the sufferer, but to punish the offender.' . . . Indeed, such is declared to be the law in nearly all the States of the Union, unless it be in those of Massachusetts and Indiana. Such, too, is the law of England") (citations omitted).

MARYLAND – *Gaither v. Blowers*, 11 Md. 536, 1857 WL 3817, at *9 (Md. 1857) (In a trespass action for assault and battery, the court affirmed a punitive damages award that both punished the defendant as well as compensated the plaintiff, explaining that "the jury [are not] confined to the mere corporal injury which the plaintiff has sustained; but they are at liberty to consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon to award such exemplary damages as the circumstances may, in their judgment require." "It may readily be supposed that the consequences of a severe

personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessaries of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured. In this class of cases, the jury may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant. The standard of damages is not a fixed one, applicable to all cases, but is to be regulated by the circumstances of each particular case.' This is good sense, and is sustained by the decisions in most of the States.") (citations omitted). *Accord Wilms v. White*, 26 Md. 380, 1867 WL 3179, at *5 (Md. 1867) (affirming judgment, stating "Exemplary damages are here recognized as a right of the plaintiffs. . . .").

MISSISSIPPI – *New Orleans, Jackson & Great N. Ry. Co. v. Bailey*, 40 Miss. 395, 1866 WL 1889, at *6 (Miss. 1866) (In a trespass against action for injuries suffered by a railroad passenger in a crash due to the negligence of railroad employees, a jury awarded, and the state's highest appellate court affirmed, an award of punitive damages against the railroad.").

Heirn v. McCaughan, 32 Miss. 17, 1856 WL 2645, at *16 (Miss. 1856) (In a tort action for fraud, gross negligence, or oppression against common carrier, a steamboat, for breach of general duty in failing to stop at a particular place and take on board the plaintiff as a passenger, according to previous notice advertised to the public, Mississippi's highest court affirmed an award of exemplary damages, explaining that in cases of "fraud, gross negligence or oppression . . . it is now too well settled to admit of controversy, that the jury may, in their discretion, award such damages by way of punishment, or for the sake of

example, as they may think that the peculiar circumstances of the wrong to the plaintiff justifies.") (citation omitted).

MISSOURI - *Goetz v. Ambs*, 27 Mo. 28, 1858 WL 5729, at *4 (Mo. 1858) (In a trespass action for assault and battery, the Missouri Supreme Court affirmed an award of exemplary damages, explaining, "if the act is willful or intentional, then 'the idea of compensation is abandoned, and that of punishment is introduced.' It is said generally that malice must exist to entitle the plaintiff to any thing more than reparation for the injury; but it will be found that the word malice is always used, in such connections, not in its common acceptation of ill-will against a person, but in its legal sense, 'willfulness - a wrongful act, done intentionally, without just cause.'") (citations omitted).

NEW HAMPSHIRE - *Towle v. Blake*, 48 N.H. 92, 1868 WL 2266, at *6 (N.H. 1868) (In a trespass action for personal injuries caused by an assault and battery, the court entered judgment on the verdict for exemplary damages, explaining that "in torts involving circumstances of aggravation, showing malice, insult, oppression, wanton or wilful violence, courts are at liberty to instruct a jury that they may find exemplary damages, such as plaintiff ought to have and the defendant ought to pay. . . . The great weight of authority, under the practice, as administered in England, and in most of the States in this country, seems to be in support of this doctrine."). *Perkins v. Towle*, 43 N.H. 220, 1861 WL 4352, *4-*5 (N.H. 1861) ("[T]he principle [i]s established, that in actions for torts to the person and personal property, the jury may give exemplary damages, &c.").

Hopkins v. The Atlantic & St. Lawrence R.R., 36 N.H. 9, 1857 WL 2820, *7-*8 (N.H. 1857) (In affirming a judgment on a plaintiff's verdict in a trespass action against a railroad by the husband to recover damages for an injury to the wife, caused by carelessness of the defendants in the management of their trains, the court held that not only may compensatory damages be recovered for loss of the wife's

services, and for expenses incurred by the husband in her cure, but that the jury may award exemplary damages where the railroad has caused a personal injury because of its gross carelessness in managing its trains. As the court explained: "If a corporation like this railroad is guilty of an act or default, such as, in the case of an individual, would subject him to exemplary damages, we think the same rule must be applied to the corporation." "It is objected that in this case exemplary damages cannot be recovered, because the foundation of the action is negligence, and not a willful and malicious act of the defendants. Such damages [however] are awarded for the sake of the public example, or to punish some act or default which has more or less the character of a crime. The right to recover them is not confined to one form of action. They may be recovered in case as well as trespass. . . . If a serious personal injury happens to a passenger, by gross negligence in the management of a railroad train, it is difficult to suggest a case where the public interest would more loudly call for an exemplary verdict. . . . Gross carelessness, where duty to the public requires the utmost care – and even that is not always sufficient to prevent the most serious calamities – has certainly a strong character of cruelty and moral turpitude. All the general reasons which have been assigned for allowing exemplary damages appear to apply in full force to this case, and we think the instructions of the court on that point were correct.").

Whipple v. Walpole, 10 N.H. 130, 1839 WL 1433 at *2 (N.H. 1839), (In an action to recover damages for the loss of the plaintiff's horses, arising from a defect in a bridge, which the defendants had been bound to repair, the court upheld an award of exemplary damages for the defendant's gross negligence, explaining that the "principle" has been "established that in actions for torts to the person and to personal property, the jury may give liberal, or exemplary damages, in their discretion – damages beyond the actual injury sustained, for the sake of the example," and quoting Chancellor Kent for the proposition that 'But it cannot be

required to multiply instances in which the doctrine contained in this part of the charge has received the sanction of the English and of the American courts of justice. It is too well settled in practice, and too valuable in principle, to be called in question.'") (citation omitted), *overruled in part on other grounds, Woodman v. Town of Nottingham*, 49 N.H. 387, 1870 WL 3060 (N.H. 1870).

NEW JERSEY – *Coryell v. Colbaugh*, 1 N.J.L. 77, 1791 WL 380, at *1 (N.J. 1791) (In an action on a promise of marriage and for seduction, which was fully proved, with strong circumstances of aggravation, the court affirmed an award of exemplary damages, explaining that the purpose of such damages in tort suits was "for example's sake, to prevent such offences in future . . . ."). *See Thompson v. Morris Canal & Banking Co.*, 17 N.J.L. 480, 1840 WL 2713, at *4 (N.J. 1840) ("[V]indictive damages, over and above mere recompense," are awarded "by way of punishment for wanton mischief or malicious and revengeful actions . . . to deter men from such kind of conduct.").

NEW YORK – *Bush v. Prosser*, 11 N.Y. 347, 359, 1854 WL 6009 (N.Y. 1854) (In an action seeking punitive damages for slander, the Court of Appeals of New York held that although civil actions are generally "designed to redress private and not public wrongs; and yet every one knows that the value of the administration of our civil jurisprudence consists not alone in the wrongs it redresses, but in those it prevents; and especially is this true of the class of actions we are considering. It will be found that, from the origin of the common law, all those actions which impute malice to the defendant have been used to some extent to protect the public interests, and to repress the indulgence of those vindictive feelings which tend to disturb the peace of society. In this view the damages should, to some extent, be measured by the degree of malice proved.").

Taylor, Hale & Murdoch v. Church, 8 N.Y. 452, 1853 WL 6035 (N.Y. 1853) ("The principle is well established as well in the English as in the American courts of justice, that in

actions for injuries to the person, committed under the influence of actual malice or with the intention to injure the plaintiff, the jury in their discretion may give damages beyond the actual injury sustained, for the sake of the example – damages not only to recompense the sufferer, but to punish the offender.") (citation omitted).

NORTH CAROLINA – *Causee v. Anders*, 20 N.C. (3 & 4 Dev. & Bat.) 388, 1839 WL 542, at *2 (N.C. 1839) (In a trespass action for assault and battery, the court upheld punitive damages based on the following instruction: "that if the jury found for the plaintiff, the amount of damage was a matter for their consideration; that usually and as a general rule in actions of this nature, the plaintiff had a right to expect a fair compensation in damages for the injury really sustained: as for the loss of time when by the act of the defendant he was rendered unable to attend to business, and the expense of calling in a physician, or the actual loss in being deprived of a tooth; but in addition to this the jury were sometimes called on to increase the amount of damages by adding on something by way of punishment, when it appeared that the defendant was actuated by malice and a total disregard of the laws, and the plaintiff was in no wise to blame.").

Smithwick v. Ward, 52 N.C. (7 Jones) 64, 1859 WL 2140, at *2 (N.C. 1859) ("vindicatory or punitory . . . damages [are] allowed to punish the defendants for violating the laws, and by making them *smart* to deter others as well as themselves from similar violations.") (emphasis in original).

OHIO – *Roberts v. Mason*, 10 Ohio St. 277, 279-80, 1859 WL 78 (Ohio 1859) (In affirming an award of punitive damages in a trespass action for assault and battery, the Supreme Court of Ohio acknowledged "[t]hat in cases of tort, where express malice is shown to have prompted the wrong complained of, the law, instead of adhering to the rule of compensation merely, permits a jury to go further, and, blending together the interest of society and of the individual aggrieved, to give damage not only to

recompense the sufferer, but to punish the offender . . . . [I]t seems to us, that if any thing can be settled by judicial decision and long and general practice, this doctrine must be regarded as thus settled.").

Ehrman v. Hoyt, 3 Ohio Dec. Reprint 308, 1858 WL 4543, at *2 (Ohio Super. Ct. 1858) (In a trespass action, the court held that "[a]s to the measure of damages, . . . [t]he first effort of a jury should be to make compensation for the actual damage sustained; but beyond this the law allows vindictive damages, or 'smart money,' as it is sometimes called, for the sake of preserving the peace of society from malicious wrong.").

Rollins v. Pennock, 2 Ohio Dec. Reprint 735, 1862 WL 2543, at *2 (Ohio Ct. Com. Pl. 1862) ("Damages beyond mere compensation are given as exemplary, vindictive or punitory damages – by way of example, and to prevent the repetition of similar wrongs in community. . . .").

Rayner v. Kinney, 14 Ohio St. 283, 1863 WL 13, at *1 (Ohio 1863) (In an action for slander, the state supreme court explained that "exemplary damages . . . are intended to punish the defendant, and to operate as an example to deter others from committing the like offense.").

PENNSYLVANIA – *Barnett v. Reed*, 51 Pa. 190, 1865 WL 4668, at *2, *5 (Pa. 1865) (In an action for the malicious abuse of legal process in issuing an execution on a judgment against the plaintiff, known by defendant to have been paid, and causing the sale of the plaintiff's goods, the court affirmed the jury's award of vindictive damages. The court held that the following charge to the jury was "unexceptionable": "Compensatory damages are such as indemnify the plaintiff, including actual loss or injury of property, loss of time and necessary expenses, counsel fees and any other actual loss the plaintiff suffered," but "where actual malice exists, a formed design to injure and oppress, the jury may give vindictive damages; that is, damages to punish the defendant for his fraud and malice.") *See Nagle v.*

Mullison, 34 Pa. 48, 1859 WL 8761, at *5 (Pa. 1859) ("[T]he law is well settled that . . . [i]n every case of oppression, outrage, and vindictiveness on part of the trespasser, the damages may be estimated and given in a punitive shape, rather than merely as compensatory."); *McDonald v. Scaife*, 11 Pa. 381, 1849 WL 5714, at *5 (Pa. 1849) ("Where there is more than ordinary wrong, either in the taking or detention, justice seems to require something in addition as a compensation to the injured party, and a punishment to the wrong-doer."); *Robison v. Rupert*, 23 Pa. 523, 1854 WL 6397, at *2 (Pa. 1854) ("Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation. . . .").

Phelin v. Kenderdine, 20 Pa. 354, 1853 WL 6203, at *6-*7 (Pa. 1853) (In affirming an award of exemplary damages in an action by a parent for the seduction of his daughter, the court noted that "[t]he distinguished advocate of the principle, that damages in actions of tort are, in all cases, to be limited to mere compensation for the injury sustained by the plaintiff, admits that the doctrine of exemplary damages 'finds more countenance from the bench in Pennsylvania than in any other quarter:' 2 Greenl., § 253, note. A long course of practice, evidenced by numerous decisions, reported and unreported, has settled the doctrine in this state so firmly that it would be a waste of time to discuss the question. Nor can it be said that our state Courts are singular in this respect. We do but adopt the language and the doctrine of the Supreme Court of the United States, when we declare that 'it is a well-established principle of the common law, that, in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.'" The court further noted that "the fraudulent means used in perpetrating the injury must add to the enormity of the outrage, and demand a higher measure of compensation and

punishment.") (citing *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)).

McBride v. McLaughlin, 5 Watts 375, 1836 WL 3051, at *2 (Pa. 1836) (In an action of trespass for a willful and malicious abuse of process and sale of the plaintiff's property, the state's highest court upheld a punitive damages award, explaining that "the authorities teach that damages may be given, in peculiar cases, not only to compensate, but to punish. . . . Mental or bodily pain is doubtless a legitimate subject of amends; produced, however, not by the infliction of suffering, but by a pecuniary equivalent. The enhancement of damages by the ability of the defendant, not being designed for the benefit of the plaintiff, must consequently be for something beyond compensation. That corrective damages may be given for the sake of example, is as old as the law itself.").

Porter v. Seiler, 23 Pa. 424, 1854 WL 6374, at *5 (Pa. 1854) (In an action of trespass to recover damages for assault and battery, the court upheld an award of punitive damages by a jury which had been "instructed that if they believed the attack was wanton and unprovoked, and with a deadly weapon, they could give exemplary, or even vindictive damages, if necessary to repress the practice of carrying and using deadly or dangerous weapons.").

Phillips v. Lawrence, 6 Watts & Serg. 150, 1843 WL 5130, at *4 (Pa. 1843) (In an action for damages arising from a breach of warranty of goods, the state supreme court explained that in a proper case a jury "are at liberty to give vindictive or exemplary damages" not only in "consideration of the mental suffering of such party produced by the conduct of the opposite party, or with a view to promote the peace and quiet of society, and to protect every one in the full enjoyment of his rights."). *See Manderson v. Commercial Bank of Pa.*, 28 Pa. 379, 1857 WL 7384, at *4 (Pa. 1857) ("It is true that . . . considerations of a public character . . . do not touch directly the private right of the plaintiff. But it is no new thing in the administration of individual justice to have

some regard for the interests of the community. It is upon this principle that exemplary damages are given in civil actions for the redress of private injuries.").

SOUTH CAROLINA - *Greenville & C.R. Co. v. Partlow*, 48 S.C.L. (14 Rich.) 237, 1867 WL 2699, at *5 (S.C. Ct. App. Law 1867) (In a trespass action, a railroad was awarded punitive damages against a farmer who, in an apparent effort to keep his cattle from escaping, erected fences too close to the railroad tracks, which were struck by an engine, damaging the engine and destroying a stretch of track. In affirming the award, the court rejected the defendant's argument that even in a case of malicious trespass, "the amount of the verdict must be restricted to the damages proved," explaining that not only did that "proposition want[] the support of authority," but that "the right of the jury, in actions for malicious torts, to find vindictive damages, had never before been questioned." Indeed, historically, "'[i]t was the province of the jury to weigh well and consider all the circumstances of the case, and to assess such damages as they thought would be [both] commensurate with the injury, and such as would effectually check such an evil.'"). *See also Rowe v. Moses*, 43 S.C.L. (9.Rich.) 423, 1856 WL 3272 (S.C. Ct. App. Law 1856) (discussing same).

Windham v. Rhame, 45 S.C.L. (11 Rich.) 283, 1858 WL 4237, at *2-*3 (S.C. Ct. App. Law 1858) (In an action for damages caused by the defendant's obstruction of the right of way to a public landing, the court affirmed the jury's award of exemplary damages, explaining that "[i]f personal property is maliciously injured or destroyed, in an action of trespass, the extent of relief is not limited to the actual loss," and "[t]he general rule adopted in injuries to person, character or property, whether the action be trespass or case, is that all the attending circumstances, showing a malicious motive, may be given in evidence, and damages may be awarded not only to recompense the plaintiff but to punish the defendant." Moreover, the availability of exemplary

damages serves an important public purpose: the prevention of violence by injured parties seeking vindication outside the courts. Thus, "if the plaintiff had endeavored either to repossess himself of his property, or to assert his right to the use of the way by abating the nuisance, otherwise than by due course of law, the consequences probably would have been a breach of the peace." Finally, "[w]here a nuisance is not abated, after one verdict, the jury may give punitive damages in a second action brought for the continuance of the nuisance, upon the ground, that from his failure to abate it, after verdict, it is presumed that the defendant's original act was wilful, and from which an intention to continue the nuisance is inferred.").

TENNESSEE – *Byram v. McGuire*, 40 Tenn. (3 Head) 530, 1859 WL 3533, at *1 (Tenn. 1859) (In an action in trover and negligence for the intentional killing of a farmer's mule by a neighbor's servants, the court affirmed an award of punitive damages, explaining the general rule that "[i]n cases of fraud, malice, gross negligence, or oppression, the law, upon authority not now to be questioned, permits the jury to give what it terms punitory, vindictive or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender.") (citation omitted).

TEXAS – *Graham v. Roder*, 5 Tex. 141, 1849 WL 4070, at *4-*5 (Tex. 1849) (In affirming an award of punitive damages, the court held that "'[t]he authorities teach that damages may be given in peculiar cases, not merely to compensate, but to punish. There are offenses against morals to which the law has annexed no penalty as public wrongs and which would pass without reprehension did not the providence of the court permit the private remedy to become an instrument of public correction,'" and that "'fraud is commonly a case for vindictive or exemplary damages.'" Indeed, allowing the jury to give "'punitory, vindictive, or exemplary damages . . . blends together the

interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender. This rule seems settled in England and the general jurisprudence of this country.'").

Champion v. Vincent, 20 Tex. 811, 1858 WL 5406, at *5 (Tex. 1858) (In reversing a trial court decision to disallow punitive damages in an action for trespass, the state's highest court held that "this was not a bare technical trespass; it was committed deliberately, in willful violation of the plaintiff's rights, in a manner and under circumstances of aggravation, showing a violent, reckless and lawless spirit; and in such cases the law allows damages beyond the strict measure of compensation, by way of punishment and for example's sake. . . . There was nothing to justify or palliate the act; it was just such an act as necessarily tends to violence and breaches of the peace, and neighborhood animosities; which destroy the harmony, peace and good order of society; and was eminently a case for damages by way of punishment and prevention.").

Cole v. Tucker, 6 Tex. 266, 1851 WL 3979, at *2 (Tex. 1851) ("[W]here trespass is committed in a wanton, rude, or aggravated manner indicating a desire to injure, a jury ought to be liberal in compensating the party injured in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation; and even this may be exceeded by setting a public example to prevent the repetition of the act. In such cases there is no certain fixed standard, for a jury may properly take into view not only what is due to the party complaining, but to the public, by inflicting what are called in law speculative, exemplary, or vindictive damages.") (citations omitted).

VERMONT – *Nye v. Merriam*, 35 Vt. 438, 1862 WL 2609 (Vt. 1862) ("When, in an action on the case for deceit, the evidence tends to show that the defendant wilfully and intentionally purposed to deceive and defraud the plaintiff, then exemplary damages for such wilful fraud are allowable. Without adverting particularly to the authorities upon this

much discussed point, we deem it sufficient to say that we understand the law to have [] been long settled in this state, that wilful fraud, as well as malice, may be punished by exemplary damages in an action of tort."). *See Learned v. Bellows*, 8 Vt. 79, 1836 WL 1226, at *1 (Vt. 1836) ("In actions of trespass, it is well settled, that the measure of damages, is not limited by the value of the property. The value of the property is usually the actual damage. But the jury may even in a case of trespass de bonis asportatis, give consequential or exemplary damages, and even vindictive damages.").

VIRGINIA – *Peshine v. Shepperson*, 58 Va. (17 Gratt.) 472, 1867 WL 2892, at *8-*10 (Va. 1867) (In an action of trespass by a Virginia shopkeeper against an out-of-state dry-goods merchants who allegedly employed self-help to retrieve unpaid goods from the plaintiff's store, the state supreme court explained that although the defendants sought an instruction limiting their damages to the value of plaintiff's goods, where, as in this case, the evidence establishes that "the trespass is accompanied by circumstances of aggravation, . . . the theory of compensation, properly speaking, fails as a rule of damages. . . . {T]he jury in such cases are not limited by the rule of compensation, but may give what are called indifferently exemplary, punitive or vindictive damages, for the sake of punishment and example. The discussion as to the theory of damages has been conducted with great learning and ability by Prof. Greenleaf in favor of the rule of compensation and by Mr. Sedgwick against it. . . . The views of Mr. Sedgwick are sustained by the Supreme Court of the United States and by the courts of most of the states. . . . ") (internal citations omitted).

WISCONSIN – *McWilliams v. Bragg*, 3 Wis. 424, 1854 WL 3450, at *4 (Wis. 1854) (The Court affirmed an award of punitive damages in action of trespass for assault and battery, and held that the jury was correctly charged: "If the offense is committed willfully, the jury have a right to give

damages as a punishment to the defendant, for the purpose of making an example, and as a warning to him and others, in addition to the damages, which are as a compensation for plaintiff's injuries." The Court explained that "the great weight of authority in the American courts is in favor of permitting juries in actions of this character, not only to take into consideration the actual injury sustained by the plaintiff, but, where that injury is inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness and malice; but in view of all such circumstances, to impose what is sometimes termed exemplary, and sometimes punitory damages, in addition to the actual damages.").

(33)

No. 05-1256

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In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

CORRECTED COPY

On Writ of Certiorari to the Supreme Court of Oregon

REPLY BRIEF FOR THE PETITIONER

KENNETH S. GELLER
EVAN M. TAGER
NICKOLAI G. LEVIN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick P.C.
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
DANIEL B. KIRSCHNER
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

MURRAY R. GARNICK
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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REPLY BRIEF FOR THE PETITIONER

Respondent fails to address the two issues as to which the Court granted review. She offers no justification for allowing the jury to punish Philip Morris for harms allegedly suffered by non-parties; to the contrary, she concedes that a jury may *not* do so. Nor does she defend the proposition, adopted by the Oregon Supreme Court, that a reviewing court may disregard the ratio guidepost if it concludes that the jury could have found the defendant's conduct to be highly reprehensible. Instead, she has reformulated the questions to raise points that petitioner has never contested. She does so because she has to: the Oregon Supreme Court's decision is indefensible and unsustainable.

I. A JURY IN AN INDIVIDUAL CASE MAY NOT PUNISH FOR HARMS TO NON-PARTIES.

Our opening brief argued that the Oregon courts violated procedural due process by holding that the jury could impose punitive damages – in the Oregon Supreme Court's words – to "punish a defendant for harm to non-parties." Pet. App. 18a. Respondent makes no attempt to defend this holding, which is flatly contrary to this Court's precedent. See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 423 (2003); PM Br. 10.

Instead of engaging the question presented, respondent offers two unremarkable and uncontested propositions: that harm to non-parties can properly be *considered* in gauging the reprehensibility of a tort; and that punitive damages can help protect the public by means of general deterrence. Neither proposition supports the decision below or is even responsive to the questions presented.

1. Respondent presents no response to our showing that the procedure endorsed below is a recipe for the arbitrary deprivation of property because it permits a defendant to be

punished for harms to unidentified individuals who are not before the court without (i) any adequate opportunity to show that those unidentified non-parties might lack valid claims, (ii) any meaningful protection against identical future claims by those persons, or (iii) any allowance for cases that the defendant has previously won or will win in the future. PM Br. 10-17; see also Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 596 (2003). Oregon's procedure is foreclosed by this Court's holding in *State Farm* that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." 538 U.S. at 423.[1]

Far from contesting these points, respondent concedes that "[t]obacco litigation has generally not been found to qualify for class-action treatment, either because individual causation issues predominate or because separate adjudications would not be dispositive of others' interests." Br. 34 n.22. This concession underscores a crucial point: an individual plaintiff such as Mayola Williams should not be allowed to recover what amounts to class-wide punitive damages in a trial that was not subject to the procedural re-

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[1] Respondent claims (Br. 42) that we have "assign[ed]" this dispositive statement in *State Farm* a "weight it cannot bear." In support of that assertion, she relies on Professor Sharkey's "'more contextualized and nuanced reasoning'" "'that the Court was primarily concerned with limiting the extraterritorial or out-of-state reach of punitive damages'" (Br. 44, quoting Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 350 (2003)). This interpretation is wrong: it cannot be squared with the Court's treatment of the non-party punishment issue as an independent and "more fundamental" concern (*State Farm*, 538 U.S. at 422), or with its observation that the problem relates to "the possibility of multiple punitive damages awards for the same conduct" and to the fact that "nonparties are not bound by the judgment some other plaintiff obtains" (*id.* at 423).

quirements and substantive limitations associated with class-action suits – requirements and limitations that provide critical due process protections to defendants.

Fraud claims of the type brought by respondent are unsuited for class treatment precisely because the issues they present require individualized showings that are impossible to prove for an undifferentiated mass of smokers. Pet. Br. 15-16. It necessarily follows that it is unacceptable to permit a single jury to *punish* a defendant for defrauding a class of non-parties in a case brought by an individual. To allow such global punishment in a case brought by an individual plaintiff would, among other flaws, deprive the defendant of the protective res judicata effect of a class action. The *de facto* class action permitted by the court below yields exactly the result that this Court foreclosed in *State Farm*: punishment for harm to non-parties that "creates the possibility of multiple punitive damages awards for the same conduct" because "nonparties are not bound by the judgment [the] plaintiff obtains." 538 U.S. at 423.

2. Lacking any basis for defending the Oregon Supreme Court's holding, respondent pretends that the court did not allow punishment for harm to non-parties after all. She maintains that the holding below simply permitted the jury to "consider[]" the harm to others "in its reprehensibility analysis." Br. 42. This revisionist account of the ruling below is demonstrably wrong. The Oregon Supreme Court expressly held that the Constitution does not "prohibit[] the state, acting through a civil jury, from using punitive damages to *punish* a defendant for harm to non-parties." Pet. App. 18a (emphasis added). Indeed, the proposed jury instruction that it rejected as legally inaccurate is virtually identical to respondent's contention here; it would have informed the jury that it may "consider the extent of harm suffered by others in determining" what award bears a reasonable relationship "to the harm caused to Jesse Williams," but that it could not

"punish the defendant for the impact of its alleged misconduct on other persons." PM Br. 4. In rejecting this proposed instruction, the Oregon Supreme Court reasoned that, "if a jury cannot punish for the conduct [that allegedly harmed non-parties], then it is difficult to see why it may consider it at all." Pet. App. 18a n.3.

3. The error below arises from a conflation of what respondent now recognizes to be two fundamentally different things: (i) considering non-party harms for purposes of assessing reprehensibility, and (ii) actually punishing for those harms. Respondent concedes that "consideration of total harm" to non-parties in assessing reprehensibility is "not the same" as "punishment for" that harm, and that the former is permissible but the latter is not. Br. 35-36. As we discussed in our opening brief (at 22), this Court has repeatedly drawn this important distinction both in the punitive damages context and in the analogous context of criminal sentencing.[2] A court may enhance the punishment for the harm caused to a plaintiff in light of the nature of the wrong, including whether it endangered a single individual or many individuals. But the extent of any such enhancement is strictly con-

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[2] See *State Farm*, 538 U.S. at 423 (non-party harm may be taken into account in assessing reprehensibility because "'repeated misconduct is more reprehensible than an individual instance of malfeasance,'" but a court cannot impose actual "punishment" for non-party harms "under the guise of the reprehensibility analysis" because that would "create[] the possibility of multiple punitive damages awards for the same conduct"); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 n.21 (1996) ("evidence" of non-party harms "may be relevant to the determination of the degree of reprehensibility" but cannot be used as a "multiplier in computing the amount of [the] punitive sanction"). Similarly, in criminal sentencing, a court may take a recidivist's other misconduct into account in imposing a sentence within the permissible range for the specific crime at issue in the case, but it may not punish for anything other than the offense of conviction. See *Ewing* v. *California*, 538 U.S. 11, 25-26 (2003); *United States* v. *Watts*, 519 U.S. 148, 154 (1997) (per curiam); *Witte* v. *United States*, 515 U.S. 389, 400 (1995).

fined: the resulting punishment must remain *within the permissible range of penalties for the harm to the plaintiff.* Thus, although the degree of wantonness reflected in a civil defendant's conduct may warrant an enhanced punitive award for the impact of that conduct on the plaintiff, that is fundamentally different from punishing the defendant for harms to non-parties who have not proven their claims and who would not be bound by the result. The former weighs the degree of reprehensibility of the defendant's conduct for purposes of assessing the appropriate award to a single plaintiff for his or her harm; the latter impermissibly punishes a defendant for unproven harm and engenders both "the possibility of multiple punitive damages awards for the same conduct" (*State Farm*, 538 U.S. at 423) and the risk of "'double count[ing]' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover" (*BMW*, 517 U.S. at 593 (Breyer, J., concurring)).[3]

Because – as respondent asserts and as we agree – this distinction is a correct statement of the law, the jury should have been so instructed and the Oregon Supreme Court's rejection of just such an instruction as "not accurately reflect[ing] the law" (Pet. App. 21a) was reversible error. And respondent offers no meaningful response to our argument that, if punishment for harms to non-parties is unconstitutional, then the Due Process Clause entitled Philip Morris to the instruction that it requested. PM Br. 23-25. Indeed, this Court in *State Farm* recognized the need to give a similar

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[3] Another way to perceive the difference is in relation to future punitive awards. If harm to others is merely a factor in the reprehensibility calculus, then it should be proper for each successful plaintiff to receive a similar award. (Plainly, the current award cannot pass any such test.) If, on the other hand, non-party harms have already been punished, then no further punitive damages should be imposed when those persons bring their own suits.

instruction to tell the jury that it could not punish for out-of-state harms. 538 U.S. at 422.[4]

Respondent also appears to suggest that the Oregon Supreme Court's review of the punitive award for excessiveness somehow cured the failure to instruct the jury correctly. See Br. 42. But that failure irremediably tainted the verdict. Respondent's counsel urged the jury to punish for harms to all Oregonians affected by smoking. J.A. 197a, 199a. And instead of giving petitioner's proffered instruction admonishing the jury not to punish for non-party harms, the trial court charged the jury that it was free to award any amount up to the $100 million arbitrarily requested in the complaint. See PM Br. 4. Post-trial review could not cure the resulting prejudice: in Oregon, as in most jurisdictions, excessive awards are remitted only to the *greatest* amount a jury could lawfully have awarded. See *Waddill* v. *Anchor Hocking, Inc.*, 78 P.3d 570, 576-77 (Or. Ct. App. 2003). Here, a properly instructed jury might well have awarded less than that maximum, so remittitur does not remedy the constitutional violation. See PM Br. 24 n.10; cf. *Minneapolis, St. P. & S. Ste. M. Ry.* v. *Moquin*, 283 U.S. 520, 521 (1931) (remittitur is inadequate for a verdict produced by passion and prejudice).

4. Respondent claims that Oregon's existing procedures are sufficient to guard against multiple punishment; in particular, she relies (Br. 45) on the provision allowing evidence

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[4] Respondent contends (Br. 48) that the court was right to deny the proposed instruction because it was internally inconsistent as to the relevance of petitioner's financial condition. In making that argument, however, respondent misleadingly quotes from two *separate, alternative* versions of petitioner's proposed instruction. The primary version stated that the jury could not rely on petitioner's wealth in setting punitive damages (J.A. 280a); the fallback version instructed the jury that it *could* consider that evidence, but that it could not punish petitioner "simply because it is large." J.A. 281a. This wholly proper "inconsistency" has no bearing on the claim of instructional error here.

of past punitive damages payments to be introduced in future cases. OR. REV. STAT. § 30.925(2)(g). That procedure, however, is no protection at all.

First, to the extent the defendant wins its subsequent cases, this system makes no provision for it to receive "credit" against the earlier, global punitive award. See PM Br. 12-13.

Second, respondent has taken the position that, under the jury-trial provision of the Oregon Constitution, a court may not consider on post-verdict excessiveness review any facts that have not been presented to the jury. If that view is correct, a defendant wishing to avail itself of this "protection" must tell the subsequent jury that one or more earlier juries found its conduct to be so reprehensible as to warrant severe punishment. Particularly in Oregon, where courts often deny a defendant's request for a bifurcated trial (see, *e.g.*, *Bremner* v. *Charles*, 821 P.2d 1080, 1083 (Or. 1991) (en banc) (bifurcation should not be granted routinely)), such a disclosure will be highly prejudicial to the defendant's prospects of winning on liability.

Third, it is not clear that prior awards that are still subject to appeal can be considered. Cf. *Bullock* v. *Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140, 171 n.26 (Cal. Ct. App.) (refusing to consider, on post-verdict review, "two specific prior California punitive damages awards totaling $59 million that became final after judgment was entered by the trial court in this matter"), rev. granted, 141 P.3d 718 (Cal. 2006).

Finally, and most fundamentally, there is no guarantee that a subsequent jury will take the prior judgments into account by giving the defendant an appropriate credit for them. It is at least equally likely that the subsequent jury would use the prior awards as a measuring stick for its own large punitive award, resulting in excessive and multiple punishment.

5. Respondent (and her amici) also repeatedly insist that prior to the enactment of the Fourteenth Amendment, exemplary damages were viewed as an established remedy and some courts invoked deterrence and the interests of the general public as legitimate objectives of that remedy. *E.g.*, Resp. Br. 37-42; Amar/McEvoy Br. 5-23. Those points are both uncontroversial and irrelevant. What matters here is that there was a general consensus among 19th-century courts that punitive damages were imposed to punish only for the injuries the defendant had inflicted upon the plaintiff before the court. See PM Br. 18-20; ATRA Br. 5-21. Notwithstanding respondent's assertion (Br. 36 n.25), not a single one of the cases cited by her or her *amici* allowed punishment for harms to others, or even remotely suggested that such a result was permissible.[5]

Consider, for example, respondent's repeated reliance (Br. 38, 39, 41 n.33; App. A at 1a) on *Bishop* v. *Stockton*, 3

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[5] In fact, several of the cases included in respondent's 24-page Appendix were also cited by ATRA in support of petitioner, because they specifically reject punishment for non-party harms. See, *e.g.*, *Phelin* v. *Kenderdine*, 20 Pa. 354, 1853 WL 6203 (Pa. 1853), and *Coryell* v. *Colbaugh*, 1 N.J.L. 77, 1791 WL 380 (N.J. 1791), cited at Resp. App. A at 15a, 18a; ATRA Br. 14–15 & n.11. Amici Amar and McEvoy devote much of their attention to *Wilkes* v. *Wood*, Lofft 1, 98 Eng. Rep. 489 (K.B. 1763), and *Huckle* v. *Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763). See Amar/McEvoy Br. 5-9. But as ATRA explains (at 12-13), there was no suggestion in either of those cases that the punishments could or should reflect the harm done to anyone but the particular plaintiff.

Finally, respondent seeks support (Br. 43) in a footnote in *BMW* in which this Court observed that "respect for the error-free portion of the jury verdict would seem to produce an award of $56,000 ($4,000 multiplied by 14, the number of repainted vehicles sold in Alabama)" as opposed to the $2 million in punitive damages left standing by the Alabama Supreme Court (517 U.S. at 567 n.11). But the issue of the propriety of punishing for harm to non-parties within the State was not raised in that case, much less resolved by this Court.

F. Cas. 453 (C.C. Pa. 1843), aff'd, 45 U.S. (4 How.) 156 (1846). The plaintiff in *Bishop* sued the owner of a stagecoach after she was injured when the stagecoach overturned. The *Bishop* court did, as respondent says, justify punitive damages as a means of "protect[ing] the community from future risks and wrongs." 3 F. Cas. at 455. But when it came to assessing the appropriate amount of punitive damages, the court focused on the particular circumstances giving rise to the plaintiff's injuries. *Ibid.* The court gave no indication that injuries to other persons in this or past accidents involving stagecoaches owned by the same defendant could or should be considered, much less that the jury could punish for such injuries.[6] Not only do the other examples proffered by respondent fail to support the argument that punitive damages historically could be employed to punish for harms to non-parties; they explicitly *contradict* that position.[7]

In short, the historical record simply confirms that the Oregon Supreme Court erred in holding that a jury in an in-

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[6] Respondent's discussion (Br. 40-41; App. A at 9a, 13a-14a) of two other cases, *Hopkins* v. *Atlantic & St. Lawrence R.R.*, 36 N.H. 9, 1857 WL 2820 (1857), and *Frink & Co.* v. *Coe*, 4 Greene 555, 1854 WL 228 (Iowa 1854), similarly confuses a justification for allowing punitive damages based on societal interests with the conduct for which a jury can punish (or, in many of the older cases, even consider). See ATRA Br. 19 n.15.

[7] For example, in *Phelin* v. *Kenderdine*, *supra* – another case respondent cites repeatedly (Br. 6 n.2, 40 n.32; App. A at 18a-19a) – the Pennsylvania Supreme Court allowed the father in a seduction case to present evidence of breach of promise to marry even though the daughter could bring her own action on that breach. The court reasoned that this was permissible precisely because in the case at hand the jury could punish only for harm to the father. Similarly, in another case from respondent's Appendix (at 15a), *Coryell* v. *Colbaugh*, *supra*, an action for breach of promise of marriage, the court barred the defendant's proffered evidence that the father had already recovered exemplary damages for seduction because the father's suit "was her father's action – she is not to be affected by it here." 1791 WL 380, at *1.

dividual case may impose punitive damages that "punish a defendant for harm to non-parties."

II. THE $79.5 MILLION PUNITIVE AWARD IS UNCONSTITUTIONALLY EXCESSIVE.

A. Respondent Does Not Defend The Oregon Supreme Court's Analysis Of The Guideposts.

Remarkably, respondent ignores the second question as to which this Court granted review: whether the Oregon Supreme Court erred in holding that the constitutional requirement of a reasonable relationship can be "overrid[den]" if the jury could have found that the defendant's conduct was "highly reprehensible" and might constitute manslaughter. Instead of defending this holding, she reframes the second question as "[w]hether the *ratio* between compensatory and punitive damages comprises the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict." Resp. Br. i (emphasis added); see also *id.* at 26. But we have never taken the position that the ratio guidepost, or any other factor, is the "conclusive" measure of excessiveness. In contrast to the Oregon Supreme Court's approach, we argued in our opening brief (at 25-33) that (i) all three guideposts must be considered together; (ii) *no* single criterion, including ratio, is sufficient on its own to assess the constitutionality of an award; and (iii) the ratio guidepost cannot be jettisoned, because it alone serves several functions that are critical to the excessiveness inquiry. Respondent answers none of these points.

Respondent's suggestion (Br. 26) that we advocate a "flat ratio approach for all cases, regardless of the facts" or a "mathematical bright-line straitjacket" is baseless. Even a cursory reading of our brief demonstrates the falsity of that contention. We explained that this Court's decisions describe a range of permissible multiples, generally between zero and nine (and zero to four when compensatory damages

are substantial, as here), and set forth certain well-defined circumstances in which the ratio can exceed the top of that range, none of which applies here. PM Br. 33-39. The reprehensibility guidepost is a key determinant of where along the spectrum the maximum ratio falls in any particular case; other factors include the size of the compensatory award, the existence of other possible deterrents, and the magnitude of the fines for comparable misconduct. *Id.* at 34-35. That approach, which is the essence of *State Farm* and *BMW*, allows all three guideposts to operate together.

B. The $79.5 Million Award Cannot Be Upheld.

Respondent does not – because she cannot – dispute our position that, under *State Farm*, a low-single-digit multiple is the constitutional maximum in most cases in which the compensatory award is substantial. See PM Br. 33-35. Nor does she challenge our showing that this Court's guidance in *State Farm* was drawn from centuries of Anglo-American legal history. PM Br. 35-38; see also ATRA Br. 21-30 & nn.18-19 (surveying the historical case law and noting that "punitive awards upheld on appeal were almost never more than one or two times the amount of the compensatory award" except where the actual damages were very small).[8]

Instead of contesting the validity of these general principles, respondent asks this Court to break new ground by holding that a 97:1 ratio can somehow satisfy due process

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[8] Neither respondent nor any of her *amici* cites a single historical case allowing a large ratio – let alone a 97:1 ratio – when the compensatory damages were not small, and we are aware of no such decision. See PM Br. 36-38; ATRA Br. 21-30. The cases cited by Professors Amar and McEvoy all involved punitive and compensatory awards substantially smaller, even in 2006 dollars, than the $79.5 million punitive award and $521,845 compensatory award here. In particular, while the professors emphasize the "enormous" £300 punitive award in *Huckle* v. *Money*, *supra*, that award is only around $43,000 in 1996 dollars. *BMW*, 517 U.S. at 597 (Breyer, J., concurring); ATRA Br. 26-27 & n.23.

because of the circumstances of this case. She proposes various justifications for departing from *State Farm*, *BMW*, and *Haslip* and carving out a new rule for tobacco cases. Br. 6-34. Not one of those purported reasons comes close to justifying a ratio above the low single digits, let alone 97:1.

1. The presence of "highly reprehensible" conduct does not justify overriding the reasonable-relationship requirement.

Respondent's primary argument is that petitioner's conduct was "uniquely monstrous" and that the sky is therefore the limit for a punitive award. Br. 7-17. Indeed, this notion – that if the defendant's conduct is highly reprehensible there is effectively *no* limit on the amount of punitive damages that may be awarded – is a theme that runs through respondent's brief (and those of most of her amici).[9]

As we pointed out in our opening brief, characterizing the misconduct at issue as "extraordinarily reprehensible" or "uniquely monstrous" cannot change the fundamental nature of the excessiveness inquiry and certainly cannot justify jettisoning the reasonable-relationship requirement. This Court's decisions establish that the ratio guidepost alone addresses indispensable components of the excessiveness inquiry such as objectivity, proportionality, and the impact of the compensatory award on the need for additional deterrence. These components are especially critical to due process where, as here, allegations of gross misconduct evoke strong emotion and can easily arouse the passion and prejudice of the jury. See PM Br. 27-33.

Respondent's arguments only underscore this point. Although respondent uses an array of pejorative adjectives to

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[9] The view that the conduct at issue here was highly reprehensible is hardly universal among juries: juries have returned *defense* verdicts in the vast majority of cases raising the same theory that plaintiff raised here. PM Br. 41 & n.29; see also R.J. Reynolds Br. 8-9 (compiling statistics).

describe petitioner's alleged misconduct, she offers no test for distinguishing between "reprehensible" conduct (which is a prerequisite for *any* award of punitive damages, and which respondent concedes is subject to the ratio constraints set forth in *State Farm*) and "highly reprehensible" conduct (as to which, she contends, sky-high ratios are perfectly acceptable). Her failure to do so demonstrates what we contended in our opening brief – that so-called "extreme reprehensibility" is a highly subjective, manipulable determination. See PM Br. 30-31. Indeed, courts and juries can find – and often have found – a defendant's conduct to be "highly reprehensible" even when that conduct was approved by relevant regulators and/or exonerated by prior juries. See Auto Mfrs. Br. 7-13, 28; PLAC Br. 9-13.

The need for the ratio requirement's objective constraint is further revealed by how readily the Oregon Supreme Court invoked "extremely reprehensible" conduct despite the absence of any jury finding to that effect. Although respondent portrays the Oregon Supreme Court as having "reviewed this case de novo" to make such a finding (Br. 3-4, 6-7), that court actually did the opposite: it repeatedly deferred to "findings" that the jury, which returned a general verdict, never in fact made.[10] Nor can a finding of extreme reprehensibility simply be inferred from the size of the award: (1) the verdict was 20% lower than the maximum the jury was told it could award; and (2) for all that appears, the size of the award was driven by the evidence of Philip Morris's wealth, and by respondent's exhortations to punish for alleged harm to all Oregonians.[11]

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[10] Respondent asserts (Br. 3), without citation, that the jury "specifically found that the scheme ensnared a large number of Oregonians * * *." The verdict form (J.A. 288a-291a) contains no such finding.

[11] In attempting to demonstrate that the jury "must have found" high reprehensibility, many of respondent's amici rely heavily on allegations of conduct (i) that had nothing to do with Jesse Williams; (ii) as to which

At bottom, the "high reprehensibility" exception that respondent proposes is functionally indistinguishable from the Oregon Supreme Court's holding that the possibility of a jury finding of high reprehensibility can "overrid[e]" the reasonable relationship requirement. The exception would swallow the rule. The due process constraints on punitive awards recognized by this Court would be eliminated whenever a court says that, taking the evidence in the light most favorable to a general verdict, the conduct could have met an undefined (and undefinable) concept of "high reprehensibility."

For all of these reasons, the *State Farm* Court identified only three potential exceptions to the single-digit ratio limit, each of which involves situations that are objectively identifiable and that do not present the prospect of repeated punitive awards: where (i) "a particularly egregious act has resulted in only a small amount of economic damages"; (ii) "the injury is hard to detect"; or (iii) "the monetary value of noneconomic harm might have been difficult to determine." 538 U.S at 425 (internal quotation marks omitted). The Court did not suggest that there might be another exception for "high reprehensibility," and it should not accept respondent's invitation to create one here.

2. The $79.5 million award cannot be justified as necessary to punish for harm to non-parties.

Respondent suggests that a 97:1 ratio is acceptable because the $79.5 million punitive award is a justifiable penalty for "the full impact of Philip Morris's misconduct on others in Oregon" and necessary for sufficient deterrence. Br. 23-26, 35.

These arguments suffer from precisely the same problems as the contention that punitive damages can properly punish

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the jury found no punitive liability, such as claims of nicotine manipulation; and/or (iii) that are not even part of the record.

for non-party harms. Respondent's arguments presume that this case represents the sole opportunity to impose punitive damages for the impact of petitioner's conduct on large numbers of other Oregonians. That assumption, however, cannot be correct: either respondent's charges of "monstrous" reprehensibility that injured thousands of Oregonians have merit, and there will be further Oregon plaintiffs bringing suit seeking further punitive and compensatory awards, or else the scope of the tortious conduct and tortious harm is not as broad as respondent asserts and requires less deterrence. Either way, the ratio guidepost is essential (i) to ensure that the punitive awards are properly apportioned among the potential plaintiffs and that multiple awards do not lead to excessive overall punishment; (ii) to account for the deterrent effect of any compensatory awards, which will likely be substantial both individually and in the aggregate if respondent is correct about the scope of the conduct; and (iii) to prevent any one jury from nullifying the findings of other juries on similar claims. See PM Br. 28-29, 32-33. It is for this reason that *State Farm* made clear that that "the measure of punishment" must be kept "proportionate to the amount of harm *to the plaintiff*" (538 U.S. at 426; emphasis added) – not to the amount of harm to other persons not before the court.

It also bears mention that respondent's assertions regarding the scope of the harm *resulting from the alleged wrongful conduct* – as opposed to smoking per se – are entirely without record basis. There was absolutely no evidence regarding the impact of the alleged *fraud* on other Oregonians. See *State Farm*, 538 U.S. at 426-27 (plaintiffs sought to justify punitive award on ground that "State Farm's policies have affected numerous Utah consumers"; this Court rejected the argument because of "the Campbells' inability to direct us to testimony demonstrating harm to the people of Utah").[12]

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[12] Respondent argues that the punishment not only must suffice to deter Philip Morris, but "'must also be sufficient to deter *others*.'" Br. 24 (cita-

Finally, respondent's related contention that the punitive award is necessary to disgorge all of petitioner's "ill-gotten gains" (Br. 21-23, 24-25, 31-34) is another variant of the erroneous argument that a punitive award can punish for non-party harms. The very same gains could be disgorged over and over at the behest of every plaintiff seeking to "justify" similarly huge awards, again turning each individual case into a *de facto* class action that fails to provide defendant with the protections of a class action. See, *e.g.*, *Johnson* v. *Ford Motor Co.*, 113 P.3d 82, 93-94 (Cal. 2005) ("aggregate disgorgement" theories violate *State Farm* because they risk the imposition of multiple and duplicative punishment); *Oshana* v. *Coca-Cola Co.*, 2005 WL 1661999, at *10 (N.D. Ill. July 13, 2005).

In any event, respondent introduced no evidence of the purported amount of petitioner's "ill-gotten gain," but only evidence of the profits earned from selling cigarettes – itself not a tortious act. See *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 442 (2001) ("[the] wrongdoing surely could not be treated as the principal cause of Cooper's entire sales volume for a 5-year period"). There was not even evidence of profits derived from sales to Jesse Wil-

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tion omitted; emphasis added); see also State AG Br. 3-7. But the uncontroversial fact that general deterrence is one objective of punitive damages does not justify ignoring the constitutional proportionality requirement in a particular case. Moreover, if respondent's characterization of the reprehensibility and magnitude of harms from the punishable conduct is in fact shared by juries in future cases, the total liability faced by the tobacco companies in civil litigation will be very substantial. And civil litigation is not the only mechanism for accomplishing deterrence. For example, the tobacco companies are responsible for billions of dollars in payments to the Attorneys General of all 50 States, including Oregon, for the same course of conduct at issue here. See PM Br. 40. The industry is also subject to extensive oversight both by the FTC and by the State Attorneys General pursuant to the MSA. *Id.* at 39-40.

liams, though that amount self-evidently could not justify the mammoth award here.

3. Respondent's other justifications for the $79.5 million award cannot withstand scrutiny.

Respondent also raises a number of additional arguments in an attempt to justify the $79.5 million punitive damage award. Not one has any merit.

a. Respondent contends (Br. 29) that wrongful-death damages understate the harm to the plaintiff because there is no compensation for "hedonic" losses – the decedent's loss of the years he otherwise would have lived. This rationale formed no part of the Oregon Supreme Court's reasoning, and it is legally meritless. In establishing a statutory cause of action for wrongful death (a cause of action not recognized at common law), the Oregon legislature provided a right to recover for certain economic and noneconomic harms. The legislature made the determination that the damages allowed under the statute (where none were recoverable previously) would "justly, fairly, and reasonably compensate" for the loss suffered by the plaintiff and that further hedonic damages were not necessary for full compensation. OR. REV. STAT. § 30.020(2); Minutes, Senate Comm. on Judiciary, HB 2350, June 8, 1973; see also *Greist* v. *Phillips*, 906 P.2d 789, 795, 797 (Or. 1995) (en banc) (statutory cause of action provides "substantial" damages).

If respondent and her amici believe that this legislative judgment is incorrect, the proper venue in which to seek relief is the Oregon legislature. Respondent's argument ultimately devolves into the untenable proposition that the Oregon courts can uphold awards that are concededly disproportionate to the plaintiff's damages award. If accepted, this argument would eviscerate the Due Process Clause's reasonable relationship requirement. In any event, even if respondent's point had some merit, it would not create a reasonable

relationship with the $79.5 million award and would still require a drastic reduction.

b. Respondent asserts (Br. 22) that, because Oregon employs various procedural safeguards in administering punitive damages, "the [punitive] award in this case should be accorded the deference due a properly rendered state court verdict." But even a verdict that is the product of adequate procedural safeguards is still subject to substantive limits: in both *BMW* and *State Farm*, the Court held the awards at issue to be excessive without expressing any disapproval of the state courts' procedures for assessing punitive damages. *BMW*, 517 U.S. at 585; *State Farm*, 538 U.S. at 419-20. There is no reason to give the verdict here any more deference than the verdicts in *BMW* and *State Farm*. Indeed, doing so would be inconsistent with the de novo review required by *Cooper Industries* and *State Farm*.

c. Respondent attempts to shoehorn this case into one of the *State Farm* exceptions to the single-digit ratio presumption by claiming that "fraud is by definition a form of misconduct that is hard to detect" and that appropriate deterrence therefore requires a greater penalty in fraud cases. Br. 30. But punitive damages claims commonly involve allegations of fraud, so respondent's interpretation of the "hard to detect" exception to single digit ratios risks swallowing the rule. Beyond that, respondent's argument is a gross overgeneralization. Certainly, some forms of fraud are clandestine. Here, however, there have been decades of public accusations that the tobacco industry had committed fraud, leading to thousands of very public lawsuits over the last 50 years (including litigation brought by virtually every State Attorney General and by the U.S. Department of Justice). See also *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 513 (1992) (by 1962, "there were more than 7,000 publications examining the relationship between smoking and health"); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 138

(2000) (by 1965, "the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects"); *Arturet-Vélez* v. *R.J. Reynolds Tobacco Co.*, 429 F.3d 10, 14-15 (1st Cir. 2005) ("such lawsuits against tobacco companies have been common for years, generating vast publicity and at least intermittent success"). These facts take this case far out of the "hard to detect" category.

d. Finally, respondent and her amici seek to justify the $79.5 million punitive award on the basis of Philip Morris's use of its resources to defend against lawsuits, as well as its litigation successes. Resp. Br. 33-34 & n.21; Trial Lawyers for Public Justice Br. 22-25; Tobacco Control Br. 11-19; AARP Br. 20-21; ATLA Br. 18-19. In addition to punishing a company for defending itself, that approach would call for a company to be punished *more* when large numbers of juries and courts have exonerated it. The fact that Philip Morris usually wins these cases at trial on the merits is a powerful reason why the punitive award here is excessive, not a reason for sustaining an otherwise unconstitutional penalty.[13]

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[13] Ironically, respondent relies heavily on *Mathias* v. *Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003). But Judge Posner made clear both then and in *Gavin* v. *AT&T Corp.*, 2006 WL 2548238 (7th Cir. Sept. 6, 2006), that enhancing punishment based on a defendant's ability to make litigation expensive for the plaintiff is permissible only when the compensatory damages are very *small*, a factor that might make it difficult for the plaintiff to find competent counsel. When, as here and in most tobacco cases, there is a prospect of a substantial recovery, "the considerations that we have just canvassed fade." *Mathias*, 347 F.3d at 677; see also *Gavin*, 2006 WL 2548238, at *6.

The idea that it is hard to sue a tobacco company is also belied by the ready availability on the Internet of all the materials necessary to launch a tobacco suit, conveniently assembled in one location (known as "trial in a box"). See, *e.g.*, Trial in a Box, at http://www.tobacco.neu.edu/box/index.html; Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 908-09 (detailing the

In any event, the Court already has rejected precisely this argument. In *State Farm*, "[t]he Utah Supreme Court sought to justify the massive [punitive] award by pointing to," *inter alia*, "the fact that State Farm will only be punished in one out of every 50,000 cases as a matter of statistical probability." 538 U.S. at 426. This Court flatly rejected that as a basis for the 145:1 ratio of punitive to compensatory damages, saying that it "bear[s] no relation to the award's reasonableness or proportionality to the harm." *Id.* at 427.

* * *

In short, the judgment in this case is irreconcilable with *State Farm*. Because "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm *to the plaintiff* and to the general damages recovered" (538 U.S. at 426; emphasis added), a punitive award that was returned after the trial court refused to tell the jury not to punish for harms to non-parties and that is 97 times the amount of the plaintiff's compensatory damages is unsustainable.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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efforts of the plaintiffs' bar to make a common pool of information and money available to lawyers who wish to sue tobacco companies).

KENNETH S. GELLER
EVAN M. TAGER
NICKOLAI G. LEVIN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
DANIEL B. KIRSCHNER
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick PC
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

MURRAY R. GARNICK
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner

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IN THE
Supreme Court of the United States

PHILIP MORRIS U.S.A.,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF *AMICI CURIAE* AARP, SOUTHERN POVERTY LAW CENTER, CONSUMER FEDERATION OF AMERICA, LAWRENCE E. MITCHELL, KELLYE Y. TESTY, DAVID MILLON, ERIC W. ORTS, KENT GREENFIELD, AND MICHAEL H. CROSBY IN SUPPORT OF RESPONDENT

DEBORAH ZUCKERMAN
AARP FOUNDATION
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-6045

Counsel for Amicus Curiae AARP

ELIZABETH J. CABRASER
(*Counsel of Record*)
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th floor
San Francisco, CA 94111-3339
(415) 956-1000

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

AARP is a 37 million member non-profit, non-partisan organization dedicated to addressing the needs and interests of people aged 50 and older. AARP focuses on ensuring access to affordable, quality health care; protecting the well-being of nursing homes and long-term care facility residents; enforcing federal and state regulations that shield older workers and persons with disabilities from discrimination; protecting consumers from deceptive financial practices; and ensuring adequate housing. AARP advocates for economic justice for victims of abuse, discrimination, financial fraud and predation, and other harmful practices, through damage awards made free from age bias.

The Southern Poverty Law Center of Montgomery, Alabama, has litigated numerous civil rights cases throughout the United States, including several landmark cases before this Court. Since 1979, the Center has succeeded in reducing the socially destructive activities of some of the nation's largest white supremacist organizations by helping victims of racist violence recover monetary damages and impose substantial punitive damages.

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[1] In accordance with Supreme Court Rule 37.6, amici state that: (1) no counsel to a party authored this brief, in whole or in part; and (2) no person or entity, other than amici, their members and their counsel have made a monetary contribution to the preparation or submission of this brief. The written consents of the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

The Consumer Federation of America (CFA) is a non-profit association organized in 1967 to advance the interests of consumers through advocacy, research and education. CFA's current membership is comprised of 300 national, state and local consumer groups throughout the county, which represent over 50 million consumers. Among other issues, CFA advocates for the rights of those harmed in the marketplace by fraud, negligence, predation, and deception. CFA supports the preservation of all currently available avenues for legitimate legal claims against the tobacco industry, including the opportunity to impose substantial damages that will adequately deter corporate misconduct.

Lawrence E. Mitchell is Theodore Rinehart Professor of Business Law at the George Washington University Law School, where he teaches corporation law, and directs the Sloan Program for the Study of Business in Society and its International Institute for Corporate Governance and Accountability. He wrote *Corporate Irresponsibility: America's Newest Export* (Yale Univ. Press 2002), and *Stacked Deck: A Story of Selfishness in America* (Temple Univ. Press 1998), both of which the publishers submitted for Pulitzer Prizes. He edits *Progressive Corporate Law* (1995), and co-authored the casebook, *Corporate Finance and Governance* with Lawrence Cunningham and Jeffrey Haas. He holds a B.A. from Williams College and a J.D. from Columbia University. **Kellye Y. Testy** is Dean and Professor of Law at Seattle University Law School, where she teaches business entities, contracts, corporate governance and economic justice. She directs the law school's Center for Corporations, Law and Society, and authored *Linking Progressive Corporate*

Law with Progressive Social Movements to Corporate Governance, 76 Tul. L. Rev. 1227 (2002), and *Adding Value(s) to Corporate Law: An Agenda for Reform*, 34 Ga. L. Rev. 1025 (2000). She holds a B.A. and J.D. from Indiana University. **David Millon** is J.D. Stombock Professor of Law at the Washington and Lee University Law School, where he teaches contracts, corporate law and legal history. He is former director of the Frances Lewis Law Center for law reform research. His publications include *Recalling Why Corporate Officers are Fiduciaries*, 46 Wm. & Mary L. Rev. 1597 (2005) (with Lyman Johnson), and *Objectivity and Democracy*, 67 N.Y.U. L. Rev. 1 (1992). He holds a B.A. and M.A. from the Ohio State University, an M.A. and Ph.D. from Cornell University, and a J.D. from Harvard University. **Eric W. Orts** is Guardsmark Professor of Legal Studies and Business Ethics and Professor of Management at the Wharton School of Business, where he teaches corporate and securities law, corporate governance, and environmental law and policy. He directs the Wharton School's Environmental Management Program. He authored *The Ethical and Environmental Limits of Stakeholder Theory*, 12 Bus. Ethics Q. 215 (2002) (with Alan Strudler); *Conflict of Interest on Corporate Boards*, in *Conflict of Interest in the Professions* (Oxford Univ. Press 2001); and *The Complexity and Legitimacy of Corporate Law*, 50 Wash. & Lee L. Rev. 1565 (1993), among other works. He holds a B.A. from Oberlin College, an M.A. from the New School for Social Research, a J.D. from the University of Michigan, and a J.S.D. from Columbia University. **Kent Greenfield** is Professor of Law and Thomas Carney Scholar at Boston College Law School, where he teaches corporate,

administrative and constitutional law. His publications include *Fundamental Flaws, Progressive Possibilities: A New View of Corporate Law* (Univ. of Chicago Press, forthcoming), and *A Bridle, a Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the* Ultra Vires *Doctrine as Methods for Controlling Corporate Behavior*, 79 St. John's L. Rev. 929 (2005) (with Adam Sulkowski). He holds an A.B. from Brown University and a J.D. from the University of Chicago.

Each of the foregoing individual *amici* conducts research and teaching in corporate law and governance. The subject matter of this appeal directly concerns the professional work of each of them. These *amici* recognize that the law relies heavily on market mechanisms to ensure that corporate directors and officers act in the best interests of their companies, shareholders, and society, and submit that large punitive damages are necessary market incentives for efficient operation of our economy.

Michael H. Crosby, O.F.M. Cap., is coordinator of the Tobacco Issue Group of the Interfaith Center on Corporate Responsibility. He is an ordained Capuchin Franciscan, writes and speaks internationally on social justice, and wrote *Catholic Church Investments for Corporate Social Responsibility*, among other works. For many years he has sponsored shareholder resolutions and other corporate reform efforts at Philip Morris USA and other tobacco companies. He holds an M.A. in economics and a Ph.D. in theology. Fr. Crosby has learned from experience that substantial punitive

damages are necessary to create market pressure on corporate behavior that is otherwise beyond the capacity of shareholders to influence.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner's challenge to the Oregon Supreme Court's decision is a thinly-veiled attack on this Court's own reprehensibility-centered jurisprudence and mischaracterizes profoundly the Oregon high court's faithful adherence to this Court's guidance. Nothing in the *Williams* decision purports to "override" the constitutional requirement that punitive damages be reasonably related to the Plaintiff's harm. Rather, the Oregon court rightly strove to reconcile evidence of death-causing conduct at the highest degree of reprehensibility with the ratio guidelines this Court fashioned in cases where lesser reprehensibility causes economic loss and temporary emotional distress.[2]

In so doing, *Williams* honored reprehensibility as the "most important indicium" of reasonable punitive damages, citing *Gore*, 517 U.S. at 575, and reached the unremarkable conclusion that "single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may

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[2] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

arise from a double-digit ratio." *Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1181 (Or. 2006).

Petitioner asks this Court to depart from its abiding principle and to embrace the notions "consistently rejected" in *Gore* and *State Farm*, "that the constitutional line is marked by a simple mathematical formula." 538 U.S. at 425; 517 U.S. at 582. Petitioner urges this Court to override the primacy of reprehensibility in favor of an arbitrary limit: a "low-single-digit" ratio (Pet. Brief, 33) that falls short of reflecting the full dimensions of Respondent's actual harm, and fails to punish or deter Petitioner's conduct.

The implications of Petitioner's ratio reduction is especially ominous for those who suffer significant harm that generates low compensatory damages: retirees not entitled to replace lost wages or recover back pay, the aged or impecunious who suffer injury or death from wrongful conduct, and victims of racial violence and intimidation. Compensatory damages calculations undervalue these lost lives and rights. Petitioner's "low-single-digit" limit would only compound this discrepancy by tying a miniscule multiplier to a compensatory numerator that itself does not fully reflect inflicted harm. This conflation will have unconscionable results: defendants will be less severely punished when those they harm are older or poorer. *Amici* thus urge this Court's adherence to its principle that a higher ratio of punitive to compensatory damages is proper when the latter are low, or difficult to measure, despite great harm. The States' interests in protecting their most vulnerable citizens from physical, financial, and emotional abuse will be thwarted if punitive

damages are rendered incapable of attaining the profit-effecting levels necessary to trigger market opprobrium and corporate behavior modification.

ARGUMENT

I. EXALTING RATIO OVER REPREHENSIBILITY UNDERDETERS EGREGIOUS MISCONDUCT

As set forth in *State Farm*, 538 U.S. at 425, "there are no rigid benchmarks that a punitive damages award may not surpass." Thus, "the judicial function is to police a range, not a point."[3] Petitioner seeks to compress this range to a vanishing point that neither punishes nor deters extremely reprehensible conduct. If, as the course of *State Farm* itself shows, a 9-to-1 ratio is constitutionally acceptable to punish and deter a single act of hardball claims adjustment that caused neither death nor permanent injury,[4] the intentional

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[3] *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003).

[4] Indeed, the ratio analysis set forth by this Court in *State Farm* enabled the Utah Supreme Court, on remand, to faithfully apply it to the record of State Farm's conduct in the *Campbell* case itself, and to find a 9-to-1 ratio fully appropriate, on its own assessment of State Farm's plaintiff-specific reprehensibility, harm State Farm's conduct caused the Campbells. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004). This Court denied further review. Reasonable judicial minds may permissibly differ, within the boundaries of constitutional due process, in assessing the reprehensibility of specific conduct that caused no wrongful death or permanent personal injury within a range of from 1-to-1 (this Court's estimation) to 9-to-1 (the Utah Supreme Court's final

conduct of Philip Morris in Oregon, which "put a significant number of victims at profound risk for an extended period of time" and was "extraordinarily reprehensible, by any measure" must warrant a substantially higher level of punishment.[5] If all reprehensible conduct of any degree, duration, or consequence can be compressed within a 9:1 range, much less the 4:1 and lower points that Petitioner urges, then the punitive damages formula no longer guarantees due process, to either Plaintiff or Defendant, but only perpetuates *underdeterrence*.

Petitioner and its *amici* have seized upon the worst possible case in which to urge punitive damages nullification. This is a wrongful death case. This Court has never considered such devastating, irrevocable personal harm in reviewing punitive damages. Key *Gore/State Farm* reprehensibility factors involve "physical as opposed to economic harm" and "indifference to or a reckless disregard of the health or safety of others," but were absent from defendants' conduct in those cases.[6] Here, the cigarettes that killed Jesse Williams are no ordinary product, and his death from lung cancer is no isolated incident. This Court has recognized the uniquely devastating public health consequences of the tobacco industry's decision to make and market cigarettes.[7] The intentionality of this conduct has

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calculation). Logically, and as suggested in *State Farm*, punitive damages for more egregious conduct causing more severe and long-lasting harm can properly far exceed this range.

[5] *Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1182.

[6] *Gore*, 517 U.S. at 576-77; *State Farm*, 538 U.S. at 419.

[7] The FDA has "found that tobacco consumption was 'the

also been exposed in Justice Breyer's *Brown & Williamson* dissent:

> According to the FDA, only 2.5% of smokers successfully stop smoking each year, even though 70% say they want to quit and 34% actually make an attempt to do so. The fact that only a handful of those who try to quit smoking actually succeed illustrates ... the reality that the nicotine in cigarettes creates a powerful physiological addiction .... The FDA has found that the makers of cigarettes 'intend' these physical effects. *Id.* at 191.[8]

Neither this specific and uniquely reprehensible conduct, nor anything like it, has been before this Court's purview in the context of the review of a punitive damages award. The pleas of Petitioner and its *amici* for an arbitrary regime that would cabin punitive damages within a 4:1, 3:1 or 1:1 range, and the irony of their selection of "a massive, continuous, near-half-century scheme to defraud"[9] as their putative poster child for reform,

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single leading cause of preventable death in the United States ...[m]ore than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses...." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

[8] The dissent additionally cites Petitioner's affirmative unfounded health claims for its products: "recognized laboratory tests have conclusively proven the advantage of Philip Morris." *Id.* at 172.

[9] *See United States v. Philip Morris*, ___ F. Supp. 2d ___, 2006 U.S. Dist. LEXIS 61412 (D.D.C. Aug. 17, 2006)

exposes an agenda to remove reprehensibility from *any* role in punitive damages assessment, thereby nullifying the States' interests in deterrence and retribution in those circumstances that will most require such moral force.[10]

II. PETITIONER'S REQUESTED "LOW-SINGLE-DIGIT" LIMIT TIES THE PUNISHMENT TO THE VICTIM, NOT THE CRIME

Petitioner would deconstruct this Court's punitive damages system by de-coupling punitive damages from the conduct of the tortfeasor, thereby dismantling the reprehensibility-punitive damages connection, and instead linking the damages only to the economic value of the victim's loss. This Court has stated that "[t]he wealth of a defendant cannot serve to justify an otherwise unconstitutional punitive damages award."[11] Surely the corollary principle must likewise be upheld: a punitive damages award cannot be limited by the economic value of the victim, particularly when the Defendant has far greater economic wealth and power. But this is precisely what Petitioner proposes: a system in which the punitive damages sanction *least* protects from fraud or exploitation those with the *most* "financial vulnerability."[12]

(Kessler, J.) (civil RICO judgment describing 50+ year deceptive scheme).

[10] *Gore*, 517 U.S. at 568.

[11] *State Farm*, 538 U.S. at 427.

[12] *State Farm*, 538 U.S. 419; *Gore*, 575 U.S. at 576-577.

Wrongful death damages undervalue older Americans, like Jesse Williams, who died at age 67. They focus on lost wages and future earning capacity, not on the contributions that older Americans have made to our society and economy during their lifetimes.[13] It is recognized among scholars of all stripes, including Petitioner's *amici*, that "[w]rongful death damages fail to compensate for the harm to decedent"[14] and result "in a systematic underestimation of damages in wrongful-death cases."[15]

That the severity, duration, and societally transgressive nature of the harm caused by a defendant's conduct is not fully reflected in compensatory damages is exposed by comparison of the compensatory damages in *State Farm*, $1 million for 1.5 years of emotional distress, with the $521,485 (Oregon statutory maximum) of wrongful death damages in *Williams*. 127 P.3d at 1171. No one would argue that these two harms are equivalent in degree, or even in kind, or that they call for punitive damages of equivalent magnitude. Indeed, as *Gore* notes "permanent" harms justify the highest verdicts. 517 U.S. at 576 n.24.

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[13] *See* W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations In Environmental and Safety Torts*, 87 Geo. L.J. 285, 314 (1998).

[14] A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 941-42 (1998).

[15] William Lanes & Richard Posner, *The Economic Structure of Tort Law 187* (1987).

A regime that calculates punitive damages primarily in relation to this diminishing value, rather than to the reprehensibility of the conduct that caused harm, serves as an ineffective deterrent to conduct that targets and victimizes the powerless, and in fact may perversely incentivize such misconduct.[16] Aside from this unintended social consequence, it profoundly misapprehends the established principles of punitive damages jurisprudence.

The first reported decision to articulate the principles of punitive damages illustrates the point. *Huckle v. Money*, 2 Wils. KB 205; 95 Eng. Rep. 768 (1763), arose from the royal campaign to suppress John Wilkes' controversial journal, "The North Briton." A general warrant naming no specific person was issued; Huckle, a hapless printer's assistant, was taken into custody by Royal agents. His confinement was humane: during his 6 hours imprisonment, his captors entertained him "by treating him with beef-steaks and beer."[17] Once

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[16] Ratio compression would eviscerate the effectiveness of punitive damages in cases that need them most, such as murder and mayhem by hate groups. *See, e.g., Macedonia v. Christian Knights of the KKK*, No. 96-14-217 (Charleston Co., S.C.) (1998) (church burning) (punitive award $21.5 million; ratio 71.67:1); *McKinney v. Southern Knights of the KKK*, No. 1:87-565-CAM (N.D. Ga. 1988) (punitive award $831,578.93; ratio 332.62:1) (attack on civil rights march); *Berhanu v. Metzger and White Aryan Resistance*, 850 P.2d 373 (Ore. App. 1993); *cert denied*, 511 U.S. 1106 (1994) (racial murder) (punitive award $10 million; ratio 10.25:1). *See* www.splcenter.org/legal/docket/files for additional cases.

[17] 95 Eng. Rep. at 768.

freed, Mr. Huckle sued for trespass and imprisonment. The jury assessed his damages at 300 £, nearly 300 times his weekly wage. On appeal, defendant admitted liability but claimed that the damages were "most outrageous" given the lack of bodily injury, the brevity of confinement, plaintiff's modest lost income, and the civility with which he was treated.

In a passage frequently cited by this Court (and Oregon's Supreme Court),[18] Lord Camden established the abiding principles of our punitive damages law, and the reasoning by which a higher ratio award (exceeding 2,000 times the value of plaintiff's lost wages) was proper.

> The personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 £ damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the

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[18] *See, e.g., Beckwith v. Bean*, 98 U.S. 266 (1879); *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101 (1893); *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927); *Munro v. Pape*, 365 U.S. 167 (1961); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Wayne County v. Wood*, 691 P.2d 473 (Or. 1984); *State v. McMurphy*, 635 P.2d 372 (Or. 1981); and *Van Lom v. Schneiderman*, 210 P.2d 461 (Or. 1949).

> subject appeared to them at the trial.... These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.

Setting, as Petitioner requests, the constitutional maximum at or near the amount of compensatory damages trivializes all harms inflicted on those of inconsiderable rank in life, rather than punishing or deterring the egregiousness of the conduct that caused the harm.

In *Matthias v. Accor Economy Lodging*,[19] Plaintiffs Burl and Desiree Mathias were bitten by bedbugs at a Chicago Motel 6. Management had refused to fumigate the motel; instead, in a charade of "farcical proportions," defendants fumigated on a room-by-room basis (one step behind the bedbugs) and lied to guests.[20] The Court affirmed punitive damages of $186,000 to each plaintiff, a 37.2-to-1 ratio, recognizing that the conduct, which was certainly foreseeably offensive, had a limited compensatory price tag attached, and hence would

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[19] 347 F.3d 672 (7th Cir. 2003).

[20] *Id.* at 674-75; *Gore*, 517 U.S. at 576, n.24: "The principle that punishment should fit the crime is deeply rooted and frequently repeated in common-law jurisprudence."

go unprosecuted, unpunished and deterred, but for the prospect of high ratio punitive damages.

Accor summarizes this Court's punitive damages jurisprudence, as it culminated in *Gore* and *State Farm*, invoking *Gore*'s first principle that "punitive damages should be proportional to the wrongfulness of the defendant's actions." 347 F.3d at 672. This rule squares with "the core of the Aristotelian notion of corrective justice ...that sanctions should be based on the wrong done rather than on the status of the defendant; a person is punished for what he does, not who he is, even if the who is a large corporation." *Id.*

Petitioner's strategy of escape from this core corrective justice principle is to shift the "fit" of the punishment from the egregiousness of the conduct to the residual actuarial value of its victim. But "[t]hat would be discriminatory and would violate the rule of law, as we explained earlier, by making punishment depend on status rather than conduct." *Accor*, 347 F.3d at 677.

The courts in *Huckle* and *Accor* recognized that the punishment for reprehensible conduct should not be scaled down to the economic worth of the lost money, or time, of the victim, but set at the level necessary for punishment and correction. Mr. Williams' lost life had small residual value: less than $1 million, expressed as compensatory damages. The inexorable economics of tort rendered his lost life far less valuable than that of a rising young executive; and the purposeful and profitable wrongful conduct that induced his smoking and took his life far more affordable, than the death of a CEO by "mere accident." Without the balancing afforded

by ratio guidelines and flexible as the capacity for reprehensible conduct, Americans become increasingly vulnerable to wrongdoing.

III. COMPENSATORY DAMAGES ARE AN INSUFFICIENT PROXY FOR HARM IN PERSONAL INJURY AND DEATH CASES

If punitive damages are not measured against the reprehensibility of the conduct, and the totality of its resulting harm to the Plaintiff's interests in liberty, health, and life, then minimal, let alone optimal, deterrence will never be achieved. This Court wisely keyed the ratio to the "actual or potential harm suffered by the plaintiff,"[21] not merely to the sum awarded as compensatory damages. The distinction has vast significance in effecting deterrence within due process bounds. Tying punitive damages primarily to the compensatory damages award in cases not limited to economic loss exploits the gap between compensatory damages and harm, to the advantage of the wrongdoer. As this Court emphasized in the first sentence of its *State Farm* decision, punitive damages are the measure of punishment that a state imposes upon a defendant in a civil case. 538 U.S. at 412. The plaintiff is a state agent in such a case, serving to protect and promote societal interests in punishment and deterrence. Restricting the range of punitive damages to the economic value of that plaintiff's loss, when his life or health has also been forfeited, will predictably frustrate the legitimate purposes of punitive damages, rather than promote them in most cases, and will certainly fail to achieve the purposes of punitive damages in cases at the

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[21] *State Farm*, 538 U.S. at 418; *Gore*, 517 U.S. at 575.

high end of the reprehensibility scale – where they are most needed.

IV. REPREHENSIBILITY-BASED ASSESSMENT ENFORCES SOCIETAL/STATE INTERESTS WHERE INTERNAL CORPORATE GOVERNANCE HAS FAILED

Philip Morris' conduct caused Jesse Williams' death. Jesse Williams was a human being; Philip Morris is a limited liability corporation. The law of Oregon, as elsewhere, treats both as legal persons, and does not discriminate[22], despite the many "peculiar characteristics of corporations as distinguished from natural persons."[23]

The reality that, apart from legal fiction, human and corporate persons are different creates a profound challenge in applying punitive damages to fulfill the express and legitimate deterrent and retributive functions this Court has acknowledged.[24] Human beings feel shame, fear, and pain. Sanctions involving death, imprisonment, or dishonor thus serve as powerful deterrents. Corporations may not be killed and themselves feel no inhibitory emotions. Human beings are held personally accountable for their crimes and torts. In contrast, corporate responsibility is merely economic, and is dispersed among thousands or millions of shareholders, none

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[22] *Behnke-Walker Business College v. Multnomah County*, 146 P.2d 614, 617-18 (Or. 1944).

[23] *Nelsen v. Davidson Industries, Inc.*, 360 P.3d 307, 310 (Or. 1989).

[24] *State Farm*, 538 U.S. at 417.

of whom is at risk in excess of her investment.[25] If punitive damages are to effectively punish and deter corporate misconduct, they must be imposed at a level sufficient to modify the behavior of the corporation's officers, directors and shareholders.

Optimal deterrence is achieved by confronting defendants with damages equal to the aggregate tortious loss, or by requiring disgorgement of all profits from reprehensible conduct. The *Williams* award itself, either alone or in combination with those handful of other smokers have obtained, does not present such a confrontation; the *Williams* award itself reflects only a week or two of Petitioner's yearly profits. Petitioner's reprehensible conduct, in Oregon and elsewhere, remains economically profitable. No unconstitutional level of punitive damages has been reached with *Williams*. Large awards are necessary to overcome the strategy of attrition that may otherwise be deployed to elude accountability. *Accor* describes the attrition problem, in which a defendant exploits litigation cost and delay to deter prosecution as follows:

> Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against suits such as this ... to make litigating against it very costly ... In other words, the defendant is investing

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[25] *See U.S. v. Philip Morris*, 2006 U.S. Dist. LEXIS 61412 at * 19 (finding, *inter alia*, that Petitioner deceptively marketed "lethal products" with "single-minded focus on financial success" "without regard for the human tragedy or social costs that success exacted.")

> in developing a reputation intended to deter plaintiffs. It is difficult otherwise to explain the great stubbornness with which it has defended this case ....[26]

A strategy of attrition is also at work in tobacco litigation. In its *Cippollone* decision, this Court rejected the tobacco industry's plea for preemption, and enabled smokers' tort claims to continue against tobacco companies, recognizing that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.[27] But not potent enough. The *Cippollone* litigation was protracted. Defendant deposed one of plaintiffs' experts, a doctor, for 22 days. While the verdict for plaintiff in *Cippollone* was $400,000, plaintiffs incurred over $500,000 in out-of-pocket costs and over $2 million in lawyer and paralegal time to accomplish this result, while an estimated $50 million was spent in defense. *See* Andrew Blume, "*Will Next Round of Smoking Challenges be Worth Pursuing?*," the National Law Journal, June 21, 1988. Tobacco company attorneys were quoted in the press as stating, "This verdict sends a message to all plaintiffs' attorneys that these cases are not worth pursuing." *Id.* As counsel for one of Petitioner's *amici* put it then:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive

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[26] 347 F.3d at 677.

[27] *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992).

> for plaintiffs' lawyers . . . To paraphrase General Patton, the way we won these cases was not by spending all of [our] money, but by making that other son of a bitch spend all of his.[28]

Until 2001, despite over 40 years of litigation, no tobacco company had paid a nickel to settle a smokers' case, or satisfy a smokers' judgment.[29] The strategy of attrition was absolute. The lesson has been well learned by would-be plaintiffs, and their lawyers. While the tobacco tragedy is certainly, in the words of a California Court of Appeal, "the quintessential mass tort,"[30] there is no quintessential mass tort litigation. The 1999 *Williams* verdict did not precipitate a wave of smokers' suits in Oregon. Past and pending tobacco suits number in the high hundreds or low thousands, not the hundreds of thousands or millions that public health statistics would predict. The tobacco companies' misconduct is open, obvious, and

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[28] *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993) (citing April 29, 1988 memo from J. Michael Jordan, counsel for RJ Reynolds Tobacco Co.).

[29] The first payout, $1 million, came in March 2001, to 70 year old Grady Carter. His years-long battle culminated in this Court's denial of certiorari. *Brown & Williamson Tobacco Corp. v. Carter*, 533 U.S. 950 (2001).

[30] *Henley v. Philip Morris, Inc.*, 114 Cal. App. 4th 1429, 1478 (Cal. App. 2004), *cert. denied*, 544 U.S. 920 (2005) ("Plaintiff's claims ...rest on a quintessential 'mass tort,' i.e., a course of more-or-less uniform conduct directed at the entire public and maliciously injuring ...an entire category of persons to which plaintiff squarely belongs.").

notorious – scarcely hidden at this point – but nonetheless "undetected."

Higher than single-digit ratios are needed to counteract such a strategy. As Judge Posner recently reiterated: "a higher multiple is permissible when the expected amount of compensatory damages . . . would be unlikely to induce a suit even of compelling merit, especially if there are multiple victims and an indication that the tortfeasor has been eluding liability successfully." Reprehensibility provides a negative incentive by rendering transgressive conduct unprofitable: "the more egregious, the higher the permissible ratio." Applying a high ratio to highly reprehensible conduct provides a complementary positive incentive to plaintiffs to overcome attrition: "[t]he proper focus of analysis of the ratio itself is the adequacy of the combined award of compensatory and punitive damages to motivate the prosecution of a meritorious claim."[31]

Petitioner and its *amici* express concern that the *Williams* award will be replicated in future Oregon suits, inflicting multiple punishment for the same harm. The Oregon statute protects against this outcome.[32] Moreover, Petitioner has resisted

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[31] *Gavin v. AT&T Corp.*, ___ F.3d ____, 2006 U.S. App. LEXIS 22644, **16-18 (7th Cir. 2006).

[32] Oregon law prevents replication of the *Williams* verdict. Philip Morris will not be punished again for its conduct toward Jesse Williams, and will be punished less, next time, for its conduct toward another Oregon smoker. Oregon law provides for consideration of past punitive damage awards. Or. Rev. Stat. § 30.925(2)(g).

the legitimate procedural solution (suggested in *State Farm)* "inclusion" of all similarly injured persons before one court for binding determination of all punitive damages toward the group. 538 U.S. at 421-22.[33]

The modern limited liability corporation, a distinctly American invention, has been extant since the mid 19th century.[34] The birth and legal recognition of the corporate form occurred in an era

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[33] Petitioner has consistently opposed and appealed every effort to bring a statewide or nationwide class action against any aspect of tobacco industry conduct. *Brief*, fn. 6. Classwide punitive damage calculations would nonetheless provide conformity and predictability within each similarly-situated group, while ensuring against overdeterrence and preventing multiple punishment. *See, e.g., Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 474 (5th Cir. 1986), affirming classwide determination of punitive damages of "reasonable proportionality" for all asbestos injury claimants on file in the Eastern District of Texas who proved "actual damages." *State Farm* does not foreclose using voluntary Rule 23(b)(3)/Rule 23(c)(4)(A) common issue mechanisms to join all who claim compensatory and punitive damages from the same defendant for the same conduct.

[34] *See, e.g.*, E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 Harv. L. Rev. 1351 (1948); M. Wormser, *Disregard Of The Corporate Fiction And Allied Corporation Problems 14* (New York: Banter, Voorhis & Co. 1927) ("The policy of our law today sanctions incorporation with the consequent immunity from individual liability. It follows that no fraud is committed in incorporating for the precise purpose of avoiding and escaping personal responsibility. Indeed, that is exactly why most people incorporate . . .").

of local transactions. There was no national communications or transportation network, and the nationwide mass marketing of standardized products was unknown. Corporations were – and still are – creatures of state law, but the 20th and 21st centuries have seen them transcend these boundaries, to conduct their business on a national and international plane.[35] Yet corporations are still creatures of state charter, and the states retain the primary role of enforcing good corporate conduct. It is thus fully appropriate that, as the states decide, on a state-by-state basis, whether to recognize punitive damages, and on how to allocate them, corporations such as Petitioner are on due notice of this variation, and are fully able to make decisions about their marketing and manufacturing conduct with due regard for compliance with these laws. Moreover, should the imposition of a "foreign" state's law be arbitrary or fundamentally unfair in a given case, Petitioner can argue for the application of its home state's law to the dispute.[36]

While the corporate form combines the aggregation of capital with the diffusion of liability among many shareholders, corporations themselves nonetheless remain accountable as legal persons, under the terms and conditions of the social contract

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[35] As Petitioner's website homepage, "PM USA At-A-Glance," states: "Philip Morris USA is the nation's leading cigarette manufacturer and for more than 20 consecutive years has had the highest revenues, income, volume and market share among U.S. tobacco companies." http://www.philipmorrisusa.com.

[36] *See Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488 (2003).

that binds each to the other in our system. Conduct that violates that contract implicates, under most states' laws, the imposition of punitive damages sufficient to punish and deter. History and recent events demonstrate that internal corporate governance cannot be relied upon to prevent either conduct that transgresses societal norms or conduct by corporate insiders that harms the interest of the corporation itself, as the Enron and options backdating scandals illustrate. Our system leaves the responsibility of policing corporations and enforcing corporate good conduct almost entirely to the states. For most of them, punitive damages are the established ultimate enforcement mechanism of choice.[37] Disabling this mechanism through arbitrary ratio limits that operate as maximum fines regardless of the level of harm or reprehensibility places those corporations whose activities affect the lives of the largest number largely outside the effective reach of civil law.

In providing a flexible ratio format informed primarily by reprehensibility, this Court went as far

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[37] The states' wide variety of punitive damage systems include "split recovery" statutes, by which some portion of punitive awards (*e.g.*, 60% in Oregon, 75% in Indiana) are deposited into state general (or special victims') funds. At least 16 states have punitive damages "caps," enacted as tort reforms to control insurance and business liability costs. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347, 372-86 (2003). Such legislative responses already accommodate Petitioner's concerns. The arbitrary limit Petitioner seeks, in essence a federal punitive damages cap, contradicts the rule that honors each state's "policy choice" on how (and how much) to punish misconduct within its borders. 517 U.S. at 571.

as it should go (and farther than several of its members thought proper) in superimposing Constitutional restraints on state statutory and common law.[38] The campaign of Petitioner and its *amici* to collapse this ratio system to an arbitrary limit disables punitive damages from regulating conduct that does societal damage.

In *Cooper*, this Court mandated appellate judicial *de novo* review, on the request of any party, of every punitive damages jury award.[39] This directive has, in the past five years, occasioned a massive investment of judicial resources in the careful review of punitive damages awards of all kinds.[40] Reversion to an arbitrary limit revokes the trust that this Court has reposed in the institution of our appellate courts, renders their ongoing efforts to apply *Gore/Cooper/State Farm* an exercise in futility, and abandons the animating truth behind primary reliance on the reprehensibility factor to generate a just and effective punitive damages award: that misconduct will continue to display an unpredictable range of reprehensibility.

Petitioner's proffered solution promotes predictability of outcome (regardless of the degree of reprehensibility) at the expense of both proportional

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[38] *See, e.g.*, *Gore*, 517 U.S. at 599 (Scalia, J., joined by Thomas, J. dissenting); *State Farm*, 538 U.S. at 429 (Scalia, Thomas and Ginsburg, JJ., dissenting).

[39] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439-40 (2001).

[40] A quick review of the LEXIS database, for example, yields over 500 federal and nearly 600 state decisions that have cited *State Farm* and/or *Cooper*.

punishment and effective deterrence. Limiting punishment to a preset ratio does not similarly limit reprehensibility itself. It simply gives a free pass to the most reprehensible conduct. This Court has seen, and will continue to see, an increasing number of *certiorari* petitions raising punitive damages questions. It may best minimize this future flow by reaffirming the flexibility of its ratio analysis and the primary importance of the reprehensibility indicium in all punitive damages calculations.

V. SUBSTANTIAL PUNITIVE DAMAGES ENABLE CAPITAL MARKETS TO DETER CORPORATE MISCONDUCT

Two principal features of corporate governance make substantial punitive damages against a corporate entity the only effective deterrent to corporate misconduct of the type which leads to death, injury, and abuse of human rights. First is a collectivity principle: the board of a publicly held corporation can act only as a board. Individual directors have no power to bind the corporation. All decisions of the board are made as a group and publicly reported as having been made by a group. In almost all cases of board misbehavior, the board can only be held liable as a group. This aspect of American corporate governance creates a dispersion of accountability and responsibility in which no single director can be held individually to account. [41]

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[41] *See, e.g.*, Elizabeth Wolgast, *The Ethics of an Artificial Person* (1992) (examining moral alienation of institutional decisionmaker from decision); Lawrence E. Mitchell, *Corporate Irresponsibility: America's Newest*

Second is an insulation principle: the structure of corporate board and managerial decisionmaking insulates the corporation's directors and officers from suffering personally from their decisions, or being confronted with the resulting personal suffering to others. No officer or director of Philip Morris USA, after participating in the decisions that led to Jesse Williams' death, ever met him, sat at his bedside, attended his funeral, or faced his family. Mr. Williams' death cannot be attributed to any single Philip Morris officer or director in a manner that would precipitate remorse or shame.

In short, the decisionmaking structure in American corporate law shields directors and officers from any of the human incentives that would lead them to apply personal standards of human decency or morality in their decisionmaking. The only way to ensure that corporate boards and executive officers have incentives to incorporate standards of decency and responsibility into their decisionmaking is through the market.

Any substantial operating loss or other adverse impact on corporate profitability will exert pressure on the share price of a public corporation's stock, and in turn on the corporation's officers and directors. Financial analysis suggests, for example, that CEOs are removed when a corporation's financial performance does not meet the expectations of its own board—especially the independent directors—or of financial analysts in

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Export (Yale Univ. Press 2002) (evaluating irresponsible corporate behavior from perspective of structural and personal detachment of board).

the broader marketplace.[42] Poor stock performance puts boards and managers under significant pressure from stockholders.[43] Large declines in a corporation's earnings put it at significant risk of shareholder litigation.[44] Moreover, a corporation's stock price performance tends to be the largest component of CEO compensation, which creates significant disincentives for CEOs to engage in corporate behavior that could adversely affect the corporation's stock price.[45] The importance to CEOs of maintaining share price is emphasized by recent findings, such as the stock options backdating

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[42] Michael S. Weisbach, *Outside Directors and CEO Turnover*, 20 J. Fin. Econ. 431 (1988); Sheila M. Puffer and Joseph B. Weintrop, *Corporate Performance and CEO Turnover: The Role of Performance Expectations*, 36 Admin. Sci. Q. 1 (1991).

[43] *See, e.g.*, Joe Lauria, *Mark Hurd Turns Around HP Fortunes*, Knight-Ridder Tribune Business News, May 21, 2006 (describing ouster of Hewlett-Packard CEO Carly Fiorina for poor corporate performance); Richard Phalon, *For Warnaco Execs It's Time to Sink or Swim*, Barron's, Aug. 28, 2006, at 20; Cassell Bryan-Low, *Vodafone Investors Stress Over Stagnant Stock*, Wall Street Journal, Feb. 8, 2006, at C-1.

[44] Jennifer Francis, *et al.*, *Shareholder Litigation and Corporate Disclosures*, 32 J. Accounting Rsch. 137 (1994).

[45] Susan J. Stabile, *Motivating Executives: Does Performance-Based Compensation Positively Affect Managerial Performance?*, 2 U. Pa. J. Lab. & Emp. L. 227 (1999); John E. Core, *et al.*, *Are Performance Measures Other Than Price Important to CEO Incentives?*, Social Science Rsch. Ntwk./Wkg. Paper Ser. EFA 0418 (2000).

scandal, that suggest CEO compensation can create significant incentives to commit fraud. [46]

Litigation against a board of directors can result in significant corporate governance reforms that improve corporate performance. "[D]erivative lawsuits have a significant effect on the governance structure of defendant firms. . . . [Empirical findings] consistently suggest that derivative suits produce improvements in corporate governance."[47] However, shareholder litigation cannot ordinarily be expected to succeed, and threats of such litigation will tend to be empty, unless there is some substantial drop in the corporation's dollar value to its shareholders. In the absence of substantial adverse effects on corporate financial performance, courts have permitted shareholders to bring actions against their board of directors for breach of fiduciary duty when the board has caused the corporation to violate the law,[48] but the board's breach of its duty of good faith has not, traditionally, been independently actionable.[49]

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[46] Shane A. Johnson, *et al.*, *Managerial Incentives and Corporate Fraud: The Sources of Incentives Matter*, Social Science Rsch. Ntwk./Wkg. Paper Ser. EFA Zurich Meetings (2006).

[47] Stephen P. Ferris, et al., *Derivative Lawsuits as a Corporate Governance Mechanism: Empirical Evidence on Board Changes Surrounding Filings*, Working Paper No. 01-03, Contracting and Organizations Research Institute (2001).

[48] *See, e.g., Miller v. AT&T*, 507 F. 2d 759 (3d Cir. 1974).

[49] *See, e.g.*, Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 Del. J. Corp. L. 1 (2006).

Punitive damages for corporate malfeasance that are high enough to impact corporate financial performance exert the same effects on corporate behavior as other adverse impacts on that performance are known to do. In the absence of substantial punitive damages, the corporation's share price will likely remain unaffected by reprehensible behavior, and derivative litigation will be unlikely, removing any legal or financial incentive for the board to behave responsibly. Instead, the board will be rewarded, by longer tenure and by higher compensation, for socially transgressive behavior so long as it increases corporate profits and raises share prices. Substantial punitive damages may be the only effective way to ensure that corporations, and their decisionmakers, experience directly the market consequences of their conduct, and accordingly direct their enterprises toward reform.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

DEBORAH ZUCKERMAN
AARP FOUNDATION
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-6045

Counsel for Amicus Curiae AARP

ELIZABETH J. CABRASER
(Counsel of Record)
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111
(415) 956-1000

Counsel for Amici Curiae AARP, Southern Poverty Law Center, Consumer Federation Of America, Lawrence E. Mitchell, Kellye Y. Testy, David Millon, Eric W. Orts, Kent Greenfield, and Michael H. Crosby

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IN THE

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PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF AMICUS CURIAE OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS IN SUPPORT OF PETITIONER

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
PAUL A. WERNER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

JOHN T. WHATLEY
ALLIANCE OF AUTOMOBILE MANUFACTURERS
1401 Eye Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 326-5548

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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IN THE

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On Writ of Certiorari to the Supreme Court of Oregon

BRIEF AMICUS CURIAE OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The Alliance of Automobile Manufacturers, formed in 1999, is a nonprofit trade association of nine car and light truck manufacturers.[1] The members of the Alliance—BMW Group, DaimlerChrysler Corporation, Ford Motor Company, General Motors Corporation, Mazda North American Operations, Mitsubishi Motors North America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc., and

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

Volkswagen of America, Inc.—account for more than 80% of motor vehicle sales in the United States.

Alliance members, and other automobile manufacturers, are affected by the phenomenon of skyrocketing punitive damages more than perhaps any other type of product manufacturer or defendant. When motor vehicles are involved in accidents, serious injury or death can result—even when the vehicles are equipped with the latest and best safety features. Plaintiffs often seek large punitive awards in such cases, and juries often award them. The large corporations that make automobiles are tempting targets for the plaintiff's bar, and are viewed as deep pockets by some juries.

Countless design choices and engineering trade-offs go into making an automobile. Some choices are demanded by the laws of physics. Others are compelled by cost-benefit calculations. As a result, automobile manufacturers frequently are subjected to enormous punitive awards by a jury applying general state common law standards—even though the design at issue complies with industry custom and practice, even though the product meets or exceeds the standard set by federal regulations, even though plaintiffs' design defect claim has been considered and rejected by the federal agency responsible for regulating motor vehicle safety, and even though numerous previous juries have returned defense verdicts in cases challenging the design. The decision below, which effectively eliminates the constitutional ceiling on the amount of punitive damages in any products liability case involving serious personal injury, promises to exacerbate the unfairness of this situation.

The Alliance offers this brief because of the great stake that its members have in seeing that the federal due process limits on punitive damage awards are clarified and strengthened in the products liability context. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a).

SUMMARY OF ARGUMENT

The limits placed by this Court on the size of punitive damage awards find support in both the substantive and procedural components of due process. "[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.' " *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 453-454 (1993) (plurality opinion) (quoting *Seaboard Air Lines Ry.* v. *Seegers*, 207 U.S. 73, 78 (1907)). In addition to these substantive considerations, "[e]lementary notions of fairness * * * dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996). Although this Court has established three guideposts for courts to use to identify and enforce these substantive and procedural limits, if the ruling under review stands they will henceforth mark only a one-way climb to ever-higher punitive damage awards. That consequence is one that would be felt particularly acutely by this Nation's automobile industry, which is a pillar of our modern economy and provides products of immense and obvious benefit.

Automobile manufacturers are already subject to wildly unpredictable but ever-increasing punitive exactions for design choices that reflect considered engineering judgments, that meet or exceed industry standards and federal regulations, and that often have been validated repeatedly by regulators, judges and juries. But authorizing juries to rely on the reprehensibility guidepost to "override" any consideration of the relationship that an exaction bears to the harm the plaintiff suffered—as the Oregon Supreme Court sanctioned here—threatens automobile manufacturers with even greater punishment for making socially-responsible and necessary risk-utility trade-offs. Products liability law encourages manufacturers to weigh the costs and benefits of any design decision, but juries (and reviewing courts) frequently and incorrectly equate that balancing act with intent to harm the plaintiff—and are provoked to punish the defendant accordingly. If punitive exactions are not meaningfully

anchored to the plaintiff's harm, but are instead keyed only to a subjective appraisal of the reprehensibility of the defendant's conduct, such exactions will rocket skyward with nothing to check them. That outcome is inconsistent with the proper functioning of the guideposts and, as a consequence, would dampen product innovation and lead to more costly but less safe products.

Furthermore, allowing a jury to calculate the amount of a punitive exaction based on speculations of the total harm that a product caused the consuming public at large—as did the court below—conflicts with this Court's precedents and fundamental due process principles. It also would increase the risk of multiple, excessive punishments for a single course of conduct and permit a lone, aberrant jury to countermand the judgments of other juries and government regulators.

ARGUMENT

I. UNDER THE OREGON SUPREME COURT'S RULING, AUTOMOBILE MANUFACTURERS WILL FACE CRUSHING PUNITIVE AWARDS FOR ENGAGING IN RESPONSIBLE AND LEGAL PRODUCT-DESIGN DECISION MAKING.

A. Automobiles, Like Other Useful Products, Are Lawful Because Their Utility Outweighs Their Risks.

The case *sub judice* involves cigarettes, a product very different from automobiles. Yet the resolution of this case will have significant consequences, not just for tobacco products, but for a wide range of consumer goods, including automobiles. Numerous products are legal to buy, sell and use despite known and potentially serious health and safety risks. Even a seemingly innocuous product like the toothpick poses a safety hazard—"over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*." *Corrosion Proof Fittings* v. *EPA*, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991) (citing Lawrence D. Budnick, *Toothpick-Related Injuries in the United States, 1979 Through 1982,*

252 J. AM. MED. ASS'N 796 (1984)). For its part, the automobile remains a key mode of human transportation—indispensable to the national economy and the modern way of life—even though thousands are injured or killed annually in automobile accidents.

Society tolerates the risks posed by toothpicks, automobiles, and countless other products because their significant utility outweighs those risks—the product's benefits trump its costs. Some of the risks associated with these products are simply inherent and cannot be alleviated no matter what value is placed on safety. *See* Robert S. Adler, *Redesigning People Versus Redesigning Products: The Consumer Product Safety Commission Addresses Product Misuse*, 11 J.L. & POL. 79, 79 (1995) ("Regrettably, if society is to enjoy the benefits of consumer products, some risks appear unavoidable."); *see also Lachance* v. *American Home Prods. Corp.*, No. 01-0890-CV-W, 2006 WL 89850, at *4 (W.D. Mo. Jan. 13, 2006) ("A knife is an unavoidably unsafe product because [it is] useful and desirable to society but cannot be produced without some risk."). Automobiles would be a far less valuable mode of transportation if they could travel only at very low speeds, and toothpicks would be useless without their sharp ends.

Other safety risks are accepted because their reduction would come at too high a price. In the case of the automobile, Justice Breyer has notably explained that consumers are not likely to pay a significant premium for only marginally safer vehicles. *See* Stephen J. Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 13-14 (1993) ("It seems unlikely that the public would pay 24 to 60 times more per car to save far fewer lives."). This is so because "[a]t some point, the cost of additional safety improvements becomes so great that additional safety measures are not worthwhile." W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 561 (2000). Since consumers will not pay to alleviate avoidable safety risks when the price of doing so exceeds the value of the added safety, manufacturers do not (and should not)

mitigate all known product hazards. Indeed, "[t]he failure to obtain risk-free products will occur regardless of whether it is the consumer or the producer who makes the safety decision." *Id.* "Tradeoffs will and must be made." *Id.* at 566.

This inherent cost constraint on product safety is reflected in the law of products liability. In most jurisdictions, a jury tasked with determining whether a product is "defective" must engage in the same sort of risk-utility analysis that keeps our roads from being clogged with armored personnel carriers. *See, e.g., Soule* v. *General Motors Corp.*, 882 P.2d 298, 311 (Cal. 1994) (jury must determine whether automobile design is defective based on "such competing design considerations as risk, benefit, feasibility, and cost"); *see generally* AMERICAN LAW OF PRODUCTS LIABILITY § 28:17 (Timothy E. Travers *et al.* eds., 3d ed. 1997) ("[M]ost jurisdictions resolve the issue of whether the product is defective by applying some form of risk-utility analysis."); *id.* § 1:22 ("The overwhelming consensus among courts deciding design defect cases today is in the use of some form of risk-utility analysis."). That analysis calls for "balanc[ing] benefits and costs to society as a whole, including the manufacturer and all consumers foreseeably affected, not just the litigating parties." Meiring de Villiers, *Technological Risk & Issue Preclusion: A Legal & Policy Critique*, 9 CORNELL J.L. & PUB. POL'Y 523, 527 (2000). As commentators have explained, "[t]he social costs considered in risk-utility balancing are the costs of adopting better, safer technology, including both capital and operating costs. The relevant benefits are reductions in accident costs achieved by reducing both the likelihood and the severity of product-related accidents." James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 883 (1998) (footnote omitted).

Thus, whether a manufacturer has struck an appropriate balance between benefits and costs—and consequently whether it is liable for an allegedly defective product—should ultimately "depend on whether the net increase in safety (net numbers of lives saved by switching designs)

outweigh[s] the increase in cost and utility." de Villiers, *supra*, 9 CORNELL J.L. & PUB. POL'Y at 528. A responsible manufacturer therefore appropriately considers not only product safety but also "elements such as marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor." Richard C. Ausness, *Retribution & Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 88-89 (1986).

B. Automobile Manufacturers Are Subject To Random—And Enormous—Punitive Exactions For Their Product-Design Decisions.

While "[c]ost-benefit analysis is fundamental to the design engineer's trade," David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 24 (1982), and striking a balance between cost, utility, and product safety implicates a "morass of conceptual, political and practical issues," *id.* at 37, current constitutional standards afford automobile manufacturers little protection from unpredictable and irrational punitive damage awards for making necessary trade-offs in the designs of their products. These trade-offs are an integral part of any product design, including the designs of the various systems in automobiles, but when a given choice will subject an automobile manufacturer to a punitive exaction is no more predictable than a lightning strike. Design choices that meet or exceed federal safety regulations and industry standards—or that have been approved of by numerous juries and validated by real-world testing and that reflect responsible design choices—are routinely the object of juror outrage and the subject of massive punitive awards. Imposing unlimited punitive awards for such design choices, without rhyme or reason, conflicts with the "[e]lementary notions of fairness" and "adequate notice" embodied in the Due Process Clause. *Gore*, 517 U.S. at 574.

Experience shows that automobile manufacturers are frequently punished for making design choices that reflect the

considered, good-faith balancing of multiple and competing safety considerations. In *Flax* v. *Daimler Chrysler Corp.*, No. 02C-1288, 2005 WL 1768725 (Tenn. Cir. Ct. June 20, 2005), for example, a Chrysler minivan in which Joshua Flax was a passenger was rear-ended by a pickup truck. The front seats yielded rearward, as designed, absorbing the energy of the impact. As the seat yielded backwards, however, the front passenger's head hit Joshua's head, causing the latter fatal brain damage. In the ensuing lawsuit, plaintiff alleged that the front seat was defectively designed because it was not sufficiently rigid. Yet, the seat's design met the industry standard. Moreover, seatback strength is specifically regulated by Federal Motor Vehicle Safety Standards—which are required by federal law to "meet the need for motor vehicle safety," 49 U.S.C. § 30111(a)[2]—and the Chrysler seatback was nearly three times more rigid than required by the federal standard. And, as explained in another case involving the same Chrysler yielding seat design—where the jury found the same seat design *non-defective*—a more rigid front seat would *increase* the risk of injury in many other collisions because it would "virtually slingshot the occupant in the event of a rear impact." *Gardner* v. *Chrysler Corp.*, 89 F.3d 729, 740 (10th Cir. 1996).

Even though Chrysler's yielding design may have been safer overall than a more rigid design, the jury in *Flax* levied a $98 million punitive exaction against Chrysler, and the trial court upheld the jury's verdict. The court found that Chrysler's conduct was "indeed reprehensible" because Chrysler "was aware that its yielding minivan seats were causing

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[2] The National Traffic and Motor Vehicle Safety Act provides that "[e]ach [motor vehicle safety] standard shall be practicable, *meet the need for motor vehicle safety*, and be stated in objective terms." 49 U.S.C. § 30111(a) (emphasis added). And "motor vehicle safety" means "the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident." *Id.* § 30102(a)(8).

injury and death." 2005 WL 1768725, at *3. This finding of reprehensibility is clearly suspect, if not irrational, because Chrysler was equally aware that rigid seats would *also* cause injury and deaths; thus, the same basis for arguing that Chrysler acted reprehensibly by making yielding seats could have been made had Chrysler made rigid seats. The extent of the punishment that could be assessed against Chrysler was at least limited by this Court's decisions in *Gore* and *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003); applying those decisions, the trial court reduced the punitive award from $98 million to $20 million. 2005 WL 1768725, at *5. If plaintiff in the instant case is correct, however, Chrysler would have been exposed to unlimited punishment for what, in truth, might well have been socially responsible conduct.[3]

The result in *Flax* is not unusual. In *Anderson* v. *General Motors Corp.*, Los Angeles County (Calif.) Superior Court No. BC 116926, *notice of appeal filed*, No. B135147 (Cal. Ct. App. Sept. 9, 1999), people injured in a post-collision fire sued General Motors, claiming that placement of the gasoline tank behind the rear axle in the 1979 Chevrolet Malibu in which they were riding created an excessive danger of fuel-fed fire in the event of a crash. But fuel system integrity—like seatback design—is specifically regulated by Federal Motor Vehicle Safety Standards, and the 1979 Chevrolet Malibu met all of those requirements. GM engineers indeed considered placing the Malibu's fuel tank over the rear axle (as recommended by plaintiff's expert at trial) but—

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[3] The Arizona Court of Appeals recently overturned a $50 million punitive damages award against DaimlerChrysler in a case involving an alleged defect in the front seat strength of a Dodge Ram club cab pickup truck. *See Douglas* v. *DaimlerChrysler Corp.*, No. CY2001-019659 (Ariz. Ct. App. Div. 1 Oct. 13, 2005), mem. op. ¶ 23. The court recognized that "a proper balance between seat yield and stiffness was needed to protect passengers during collisions" and further noted that "Daimler designed its seat to withstand a rearward movement of 8,759 inch-pounds, almost three times the required Federal Motor Vehicle Standard 207." *Id.* at ¶ 17.

following real-world testing of both the over-the-axle and behind-the-axle designs—they decided to place the vehicle's tank in the same location as 98% of the other vehicles marketed instead: behind the rear axle. In their judgment, the over-the-axle design on balance posed a greater safety hazard in the event of a collision, as it was located closer to the vehicle's passengers, and was also less functional and harder to service. The jury nevertheless found the fuel tank placement defective—although it did so without ever hearing evidence of the Malibu's exemplary safety record in the field because the trial court excluded the evidence GM offered to show that the Malibu's fire risk in rear-end collisions was extremely remote and as low or lower than that of similar vehicles. And with its verdict, the jury delivered an astonishing $4.8 billion punitive damage award to plaintiffs, an award that the trial court reduced, based on *Gore*, to an almost equally astonishing $1.09 billion.

One more example should suffice to illustrate the sheer randomness with which punitive awards are imposed on automobile manufacturers. In *Buell-Wilson* v. *Ford Motor Co.*, __ Cal. Rptr. __, 2006 WL 2002858 (Ct. App. July 19, 2006), the driver of a 1997 Ford Explorer lost control of her vehicle when she swerved to avoid an object in the road. The vehicle rolled over, and the driver was rendered a paraplegic. Plaintiff alleged that the Explorer was unreasonably dangerous both because it was prone to roll over in emergency avoidance maneuvers and its roof was insufficiently crush-resistant. *See id.* at *2, *6.

It has been generally known for decades that sport utility vehicles like the Explorer handle differently and are more likely to roll over than passenger cars. *See, e.g., In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 982 F. Supp. 388, 391-392, 396 (E.D. La. 1997). Nevertheless, the National Highway Traffic Safety Administration ("NHTSA") has repeatedly refused to find SUVs defective for this reason because SUVs offer advantages that passenger cars do not. *See* 64 Fed. Reg. 27,343 (May 19, 1999) (summarizing

NHTSA's investigations of various SUVs).[4] Plaintiffs in *Buell-Wilson* condemned the Explorer as having the same stability defects as the Bronco II, but NHTSA has *twice* investigated the Bronco II and refused to find that it is defective. *See* 64 Fed. Reg. 27,343. For decades, NHTSA has been studying ways to measure and evaluate resistance to rollover, and it has repeatedly rejected the two methods relied upon by plaintiffs to condemn the Explorer.[5] And, if permitted, Ford would have presented to the jury accident statistics showing that Explorers do not roll over any more frequently than competitive SUVs, but the trial court excluded this evidence.

Prior to the trial in *Buell-Wilson*, Ford had never lost an Explorer rollover case, and 13 juries had returned defense verdicts in such cases.[6] But the *Buell-Wilson* jury—completely uninformed of how the Explorer was actually performing in the real world—returned a verdict awarding $246 million in punitive damages. The California Court of

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[4] For example, NHTSA has recognized that "redesigning a vehicle to significantly reduce its likelihood of rolling over necessarily involves making fundamental changes in the vehicle's dimensions (making it wider, longer, lower, heavier) and compromising its utility to consumers (e.g., by reducing its fuel efficiency, ground clearance, load-carrying capacity, off-road capability, or driveability on snowy roads)." 61 Fed. Reg. 28,550, 28,552 (June 5, 1996).

[5] *See, e.g.*, 53 Fed. Reg. 34,866, 34,867 (Sept. 8, 1988) ("the stability factor [is] not sufficiently reliable or discriminating among vehicles to identify a defect"); *id.* (Consumers Union "test procedures do not have a scientific basis and cannot be linked to real-world crash avoidance needs, or actual crash data."); 52 Fed. Reg. 49,033, 49,035 (Dec. 29, 1987).

[6] Ford has also received favorable results in Explorer roll over cases since that time. *See Shatz* v. *Ford Motor Co.*, 412 F. Supp. 2d 581 (N.D. W. Va. 2006) (jury verdict in Ford's favor); *Davis* v. *Ford Motor Co.*, No. Civ. A. 302CV271LN, 2006 WL 83500 (D. Miss. Jan. 11, 2006) (mem. op.) (judgment as a matter of law in Ford's favor); *cf. Jaramillo* v. *Ford Motor Co.*, 116 Fed. Appx. 76 (9th Cir. 2004) (initial jury verdict in favor of Ford reversed and remanded for new trial).

Appeal disregarded the 13 prior verdicts, ruled that evidence of the Explorer's performance relative to other SUVs was irrelevant and inadmissible, and found that Ford's conduct was highly reprehensible—even though reasonable people, including the federal government, might conclude in good faith that the Explorer was not defective. Nevertheless, applying this Court's decisions in *Gore* and *State Farm*, the court reduced the punitive award to $55 million, or two times the compensatory damages. Thus, once again, the ratio guidepost at least limited the amount of punitive damages that could be assessed for "highly reprehensible" conduct that, in truth, probably was not reprehensible at all.

Similar examples abound, demonstrating the unpredictability of a jury's decision to punish an automobile manufacturer for a design choice and the tendency of reviewing courts to defer to such jury decisions. *See, e.g.*, *General Motors* v. *Moseley*, 447 S.E.2d 302 (Ga. Ct. App. 1994) ($101 million punitive award not excessive even though side-saddle fuel tank design at issue met applicable NHTSA safety standard), *overruled on other grounds*, *Webster* v. *Boyett*, 496 S.E.2d 459 (Ga. 1998); *Clark* v. *Chrysler*, 310 F.3d 461, 469 (6th Cir. 2002) (punitive award based on door latch design affirmed because court concluded that the relevant federal motor vehicle safety standard did not reflect how a latch would perform in a real accident), *vacated & remanded*, 540 U.S. 801 (2003), *appeal after remand*, 436 F.3d 594 (6th Cir. 2006); *Jablonski* v. *Ford Motor Co.*, No. 03-L-2027, 2005 WL 2837524 (Ill. Cir. Ct. Apr. 28, 2005) (judgment) (punitive damages approved by trial court even though design of 1993 Town Car's fuel system met federal motor vehicle safety standard that did not go into effect until 2006).

The unpredictability of the current legal environment will, however, be overshadowed by the severity of the punitive exactions levied and upheld against automobile manufactures for making conscious design choices if the reprehensibility guidepost is converted from "the most important indicium of the reasonableness of a punitive damages award," *Gore*, 517 U.S. at 575, into a constitutional trump card that reviewing

courts may play in fulfilling their constitutionally-mandated role to review punitive damage awards for compliance with due process. *See Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 21 (1991) ("[A]ppellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose.").

C. If The Reprehensibility Guidepost May "Override" Other Due Process Limits On Punitive Damages, Manufacturers Will Face Even More Severe Punitive Exactions For Any Product Design That Carries Risks.

If the reprehensibility guidepost is nothing more than a "competitive tool[ ]" (Pet. App. 32a) that may be employed to "overrid[e]" (*id.* at 33a) the ratio guidepost, the sky is the limit for punitive damage awards in products liability cases involving serious personal injury. As Justice Breyer warned in *Gore*, "reprehensibility" would be "a concept without constraining force" because it would be drained of "its constraining power to protect against serious and capricious deprivations" of private property. *Gore*, 517 U.S. at 590 (Breyer, J., concurring).

Although products liability cases do not inherently belong at the high side of the reprehensibility scale, there is an erroneous tendency automatically to place them there simply because such cases usually involve serious injury or death, and because jurors view the harms suffered by the plaintiff through the distorting but powerful lens of hindsight bias. While manufacturers must design products based on multiple and abstract considerations, jurors (and reviewing courts) frequently discount considerations such as cost or product "marketability, appearance, ease of operation, durability, [and] freedom from maintenance or repair," Ausness, *supra*, 74 KY. L.J. at 88-89, when confronted by real injury or death. "So long as jurors are drawn—as they must be—from the general population, it seems unrealistic to expect the jury to disregard this basic belief [*i.e.*, that life is priceless] either in determining liability or in ruling on punitive damages." Gary T. Schwartz, *Deterrence & Punishment in the Common Law*

of Punitive Damages: A Comment, 56 S. CAL. L. REV. 133, 152 (1982). Thus, rather than comparing "expected benefits and costs based on the state of information before the accident," jurors instead "may compare the enormous cost to the victim with the relatively negligible cost of the safety improvement" after an accident has already occurred and the manufacturer haled into court. Viscusi, *supra*, 52 STAN. L. REV. at 563.

Judge Easterbrook aptly described this phenomenon in a case involving a woman injured when someone pressed the emergency stop button on the escalator she was riding.

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. Engineers design [products] to minimize the sum of construction, operation and injury costs. * * *
>
> Come the lawsuit, however, the passenger injured by a stop presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured if buttons were harder to find and use are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. * * * [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states. [*Carroll* v. *Otis Elevator Co.*, 896 F.2d 210, 215-216 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted).]

But Judge Easterbrook is not alone in recognizing the hindsight bias problem. *See, e.g.*, W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 116 (2001) (corporations' "superior ex ante risk judgments may be outweighed by the ex post reality of the accident victim"); Viscusi, *supra*, 52 STAN. L. REV. at 552 (mock juror study showing that proper risk balancing inflates punitive awards against corporations). As another

commentator explained, "jurors have a natural sympathy for a seriously injured person that is reinforced when the defendant is a manufacturer, for many persons are hostile toward major institutions in general and 'big business' in particular." Owen, *supra*, 49 U. CHI. L. REV. at 11 (footnote omitted).

This inherent bias—which operates to artificially locate any products case at the high-end of the reprehensibility scale from the outset—is exacerbated when the plaintiff can demonstrate that the manufacturer undertook risk-utility analysis in selecting a product design. Notwithstanding that responsible manufacturers "think about risks in a systematic matter and * * * undertake [cost-benefit] calculations to ensure that there is appropriate risk balancing that is sufficiently protective" (Viscusi, *supra*, 52 STAN. L. REV. at 550)—and, in most jurisdictions, are subject to liability only for erroneous calculations—jurors and reviewing courts frequently regard such assessments as base financial calculations worthy of extreme sanction. "[O]ne person's sound engineering is another person's trading lives for profits." Owen, *supra*, 49 U. CHI. L. REV. at 47.

The paradoxical consequence is that, while systematic risk-utility analysis *ex ante* is the stuff of responsible corporate decision-making that products liability law affirmatively encourages, *ex post* it is a "red flag[ ]" signaling nothing short of "callous disregard for human health" and the concomitant need for a serious punishment. Viscusi, *supra*, 52 STAN. L. REV. at 578. Commentators have noted how this unfolds in the typical products case: "Regardless of how high the manufacturer sets the design standard, when an accident does occur, the plaintiff's lawyer will have an expert testify [that] the product could have been made safer, and the injury prevented, if the manufacturer had just been willing to spend some additional money." Andrew C. Clausen & Annette M. Carwie, *Problems Applying the* Life of Georgia *v.* Johnson *Case in the Product Liability Setting: Where Do We Go With Punitive Damages After* BMW *v.* Gore*?*, 58 ALA. LAW REV. 46, 48 (1997). And "[a]s a result, an argu-

ment for reprehensibility can be supported in virtually every case." *Id.*

In the products liability setting, therefore, there is a real danger that the reprehensibility guidepost will become not a meaningful trigger for imposing punitive awards or identifying excessive ones, but a one-way lever for ratcheting them ever skyward. Design defect cases necessarily come with intent to harm the plaintiff "built in," Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 VILL. L. REV. 353, 356 (1994), because "a manufacturer's choices involving necessary safety trade-offs and statistically inevitable risks always can be viewed in a sense as intentional wrongs to consumers hurt by such products, as safe on balance as such products may actually be." Owen, *supra*, 49 U. CHI. L. REV. at 26 (footnote omitted). *See also* Viscusi, *supra*, 52 STAN. L. REV. at 566 ("[U]ndertaking [cost-benefit] analysis and making a conscious decision to forego the improvement will subject a company to the charge that it 'deliberately intended to injure the plaintiff.' ").[7] Thus, if every design adopted in the face of known risks can be treated as an intentional wrong, "every actor could be held strictly liable * * * for punitive, in addition to compensatory, damages for any consequence to any person that was contemplated in advance of any course of action." Owen, *supra*, 49 U. CHI. L. REV. at 22. *See also id.* at 23 ("The decision to market a product in a certain condition with certain risks may have been a good one because the expected benefits were great, and the product may not have been legally defective at all, yet under this standard the manufacturer remains subject to punishment for 'disregarding' the lesser risk by proceeding to sell the product with any danger whatsoever.").

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[7] A claim of intentional misconduct may, moreover, be even further aggravated by the manufacturer's equally conscious—but lawful and legitimate—decision to market its product. *See, e.g., Nissan Motor Co.* v. *Armstrong*, 32 S.W.3d 701, 704 (Tex. Ct. App. 2000), *aff'd in part, rev'd in part & remanded*, 145 S.W.3d 131 (Tex. 2004). The promotion of a product deemed, in hindsight, to be "defective" can be easily—but incorrectly—labeled "fraud."

As the foregoing cases illustrate, juries often punish product manufacturers with punitive damage awards for thinking systematically about risk, and automobile manufacturers' conscious choices of designs that carry known safety hazards have frequently provoked particularly severe punishments. *See Ford Motor Co.* v. *Sasser*, 618 S.E.2d 47, 57 (Ga. Ct. App. 2005) (upholding punitive damages award, in part, because "various pre-production internal documents discussed" seat latch safety improvements but "Ford chose not to adopt" them). The case of *Grimshaw* v. *Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981), remains—even a quarter of a century later—a classic example. Grimshaw was severely injured when the Fort Pinto in which he was a passenger was hit from behind by another vehicle in a way that caused a fire. He subsequently claimed that the placement of the fuel tank behind the rear axle and the design of the fuel filler pipe were defective. The jury awarded $125 million in punitive damages (later reduced to $3.5 million) based, in part, on Ford's performance of a systematic cost-benefit analysis.[8]

Products liability cases already gravitate toward the high end of the reprehensibility scale, but for reasons unrelated to the true reprehensibility of the conduct at issue. The approach of the court below will exacerbate this dynamic by permitting jurors and reviewing courts to rely exclusively on the reprehensibility guidepost to punish automobile manufacturers for undertaking what might well be viewed, outside of the courtroom, as responsible risk-utility analysis.

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[8] One commentator has explained that the corporate document containing Ford's cost-benefit analysis "has been assigned an operational significance that it never possessed, and has been condemned as unethical on account of characterizations of the document that are in significant part unwarranted." Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1026 (1991).

D. Punishing Automakers For Making Risk-Utility Calculations Creates The Wrong Incentives.

Punitive damages, as this Court has repeatedly observed, are intended to punish misbehavior and thereby discourage its recurrence. *See, e.g., Cooper Indus. Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (punitive damages "operate as 'private fines' intended to punish the defendant and deter future wrongdoing"); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."). But current constitutional standards for review of such awards do not afford automobile manufacturers significant guidance in choosing designs that will not subject them to severe punishment by a civil jury.

The upshot of the ruling below—that the reprehensibility guidepost may override the ratio guidepost—is not simply another ripple of uncertainty in the punitive damages terrain. It will operate to further deter manufacturers from consciously engaging in the responsible, systematic risk-utility analysis that products liability law is actually intended to foster because design choices adopted in light of such analysis will expose them to more severe punishment than those that are not. As one commentator explained, "[r]isk analyses and, in particular, analyses that values lives highly, are harmful to the company's prospects, whereas failing to think systematically about risks and undervaluing human life is a less costly corporate strategy." Viscusi, *supra*, 52 STAN. L. REV. at 588; *see also* Schwartz, *supra*, 43 RUTGERS L. REV. at 1037 ("Not only does this risk-benefit liability standard *tolerate* situations in which the manufacturer trades off safety for the sake of cost, but the standard rests * * * on a philosophy which actually *encourages* manufacturers to consider such trade-offs, a philosophy that specifies that the welfare of society is generally enhanced when the manufacturer chooses a design that strikes the right balance between advantages and disadvantages.") (emphases in original).

The rule announced by the court below would create perverse incentives with untoward consequences for society. In fact, it would lead to consumer products that are less safe. Consider that a responsible product manufacturer contemplating a given safety improvement will "obtain a thorough understanding of the risks involved and how the safety device would affect those risks." Viscusi, *supra*, 52 STAN. L. REV. at 565. While that comprehensive assessment could be expected to lead the manufacturer to opt for an efficient level of safety—*i.e.*, it would only adopt the safety improvement if its benefits outweighed its costs—the manufacturer would not risk performing the assessment if declining to adopt the innovation (because its costs exceeded its benefits) would expose it to a severe penalty for "explicitly trading off lives against money." *Id.*

By the same token, "the more a manufacturer is truly concerned about its product's safety, the more it will encourage self-criticism and 'negative' analyses of the product within the company." Owen, *supra*, 49 U. CHI. L. REV. at 17. Indeed, "it often is desirable during the initial stages of a product's design to test it to its limits to discover what those limits are." *Id.* at 17-18. These efforts are desirable to society because exposing a product's weaknesses and exploring dissatisfaction with it lead the manufacturer to produce a superior product. *See id.* at 18. Nevertheless, a manufacturer would rethink such efforts if doing so were tantamount to sowing "the documentary seeds for a punitive damages claim in a future products suit." *Id.*

The exorbitant punitive damage awards in products liability cases that are a by-product of systematic risk-utility analysis and product testing also inevitably lead to less innovation. Such awards "tend to discourage participation in the underlying economic activity." *Perez* v. *Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 622 (7th Cir. 2000). In other words, "if damages exceed harm, parties may be led to curtail their activities to an inappropriate extent—to refrain from engaging in them even when the benefits exceed the harms caused." A. Mitchell Polinsky & Steven Shavell, *Punitive*

Damages: An Economic Analysis, 111 HARV. L. REV. 869, 882 (1998). Consequently, "a firm might be induced to withdraw its product from the marketplace even though consumers place a higher value on the product than its full cost of production, which includes the average harm caused by the product." *Id.* *See also* Cass R. Sunstein, *et al.*, *Assessing Punitive Damages (With Notes on Cognition & Valuation in Law)*, 107 YALE L.J. 2071, 2077 & nn.22-23 (1998) ("[A]s a practical matter, a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies.").

II. PUNISHING A DEFENDANT FOR SPECULATIVE HARMS TO NON-PARTIES IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND DUE PROCESS.

The ruling below approved of the plaintiff's invitation to the jury to punish Philip Morris for its harm to Jesse Williams as well as to other, unidentified persons like him that "have been" similarly injured in the "last 40 years" and the "many more out there in the future." Pet. for Cert. 2. This type of open-ended invitation to punish a defendant for speculative harms is a common feature of products liability lawsuits and one that, if the jury accepts it, predictably rockets punitive exactions into the financial stratosphere.[9]

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[9] *See* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 584 (2003) ("The plaintiff's attorney, although she usually represents only one (or, at most, a few) of the many victims, will typically ask the jury to impose punitive damages in an amount sufficient to punish the defendant not only for harming the plaintiff, but also for the full scope of the harm that its conduct caused to all victims and all of society."); *id.* at n.3 (citing cases). In *Sand Hill Energy, Inc.* v. *Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002), *vacated & remanded*, 538 U.S. 1028 (2003), *decision on remand*, 142 S.W.3d 153 (Ky. 2004), the $20 million punitive exaction imposed on Ford was equivalent to $100,000 for each of 200 nationwide deaths that plaintiff's counsel claimed in his closing argument resulted from Ford's transmission design.

But it is also one that is fundamentally at odds with this Court's punitive damages jurisprudence and basic notions of fairness and due process.

A. Punitive Damages Must Bear A Rational Relationship To The Harm Suffered By The Plaintiff.

The notion that a jury may impose a punitive damages award that reflects assumed harms to unknown persons is irreconcilable with this Court's analytical framework for determining whether a punitive damage award comports with the Due Process Clause and its precedents implementing that framework. In particular, it is incompatible with this Court's second, ratio guidepost as well as this Court's explanation of the first, reprehensibility guidepost.

The Court explained in *Gore* that the "second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio *to the actual harm inflicted on the plaintiff*." *Gore*, 517 U.S. at 580 (emphasis added). But that was not the first—or last—time that this Court acknowledged that "the proposition that a comparison between the compensatory award and the punitive award is significant." *Id.* at 581. *See State Farm*, 538 U.S. at 418; *TXO*, 509 U.S. at 459; *Haslip*, 499 U.S. at 23. Recognizing that "traditional practice provides a touchstone for constitutional analysis," *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994), this Court has emphasized this "significant" proposition's time-tested pedigree. *Gore*, 517 U.S. at 580.

While the Oregon Supreme Court did not dispute the import of this guidepost in theory, its holding that a defendant may be punished for harms to unknown non-parties eviscerates it in practice. *Compare* Pet. App. 20a ("[W]e conclude that evidence of *similar* conduct against other parties may be relevant to a punitive damage award.") (emphasis in original) *with id.* at 31a ("[W]e conclude that the ratio guidepost considers only harm to the plaintiff."). A reviewing court simply cannot meaningfully evaluate under the ratio guidepost whether a given punitive damages award reasonably correlates to the harm suffered by the plaintiff—and therefore

is not excessive—if that very penalty is actually based upon harm to unknown others aside from the plaintiff as well. Such an undertaking would be an exercise in futility. Indeed, "if punitive damages were punishment for the full scope of the wrong to society, rather than simply the wrong to the plaintiff, it would make no sense to require a reasonable relationship between the amount of punitive damages and the amount of the individual plaintiff's compensatory damages." Colby, *supra*, 87 MINN. L. REV. at 607.

Permitting a plaintiff to recover a punitive damages award that reflects harms to non-parties is not simply facially incompatible with the ratio guidepost. It is also inconsistent with this Court's instructions regarding the proper application of the reprehensibility guidepost. In *State Farm*, the Court in fact "emphasized that courts cannot award punitive damages to plaintiffs for wrongful behavior that they did not themselves suffer." *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). The *State Farm* Court expressly rejected Utah's reliance on the defendant's "nationwide policies rather than * * * the conduct directed toward the Campbells," 538 U.S. at 420, as a basis for "awarding punitive damages to punish and deter conduct that bore no relation to the Campbell's harm." *Id.* at 422. It explained that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." *Id.* at 423. *See also White* v. *Ford Motor Co.*, 312 F.3d 998, 1015 (9th Cir. 2002) (holding that "the jury was permitted to engag[e] in a due process violation * * * when it arrived at its punitive damages award" because "it was permitted * * * to award damages to vindicate the interests of all Ford pickup truck buyers everywhere" and "measure damages by Ford's harm to the whole country").

Although *State Farm* held that a jury cannot *punish* a defendant for harm to non-parties, it did not foreclose a jury from considering additional harms to others in gauging the *reprehensibility* of the defendant's conduct. The Oregon Supreme Court thought this distinction too fine, *see* Pet. App.

18 n.3, but it is one ingrained in this Court's punitive damages jurisprudence. In *Gore*, the Court explained that "the fact that the Alabama Supreme Court correctly concluded that it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction does not mean that evidence describing out-of-state transactions is irrelevant in a case of this kind." 517 U.S. at 574 n.21. That evidence, the *Gore* Court explained, "may [instead] be relevant to the determination of the degree of reprehensibility of the defendant's conduct." *Id.* In addressing Gore's contention that BMW's conduct was particularly egregious because it constituted part of a "nationwide pattern" of nondisclosure, the Court additionally accepted that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." *Id.* at 576-577. In this regard, it observed that "[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance." *Id.* at 577.

The Court struck a similar chord in *State Farm*. It did not reject Utah's "recidivist" theory of punishment out of hand but held only that the facts of the case did not support it. *See* 538 U.S. at 423-424. Although "evidence of other acts need not be identical to have relevance in the calculation of punitive damages," *id.* at 423, the Court explained that the evidence proffered in the case "had nothing to do with a third-party lawsuit" and that "[o]ther evidence concerning reprehensibility was even more tangential." *Id.* at 424. Accordingly, the Court concluded that "[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance." *Id.* This Court's precedents thus clearly embrace the careful distinction that the ruling below rejected.

Permitting a jury to base a punitive damages award on speculations about harms to non-parties also suffers another

fundamental due process defect of constitutional magnitude. Of course, a plaintiff cannot recover any punitive damages from a defendant without first prevailing on the merits of his underlying lawsuit. *See* Colby, *supra*, 87 MINN. L. REV. at 607 ("Under current law, * * * a defendant cannot be made to pay punitive damages unless the plaintiff establishes an underlying civil cause of action[.]"). "[I]f the civil action fails for any reason, the defendant will escape liability for punitive damages." *Id.* Thus, the failure of proof on an element of a plaintiff's claim—*e.g.*, causation—or the existence of an affirmative defense—*e.g.*, the running of an applicable statute of limitations—will bar plaintiff's recovery of any damages, including punitive ones.

But permitting a plaintiff to recover an award premised on supposed harms that the defendant caused to others not involved in the litigation eliminates this basic requirement that a plaintiff prevail on the merits of his lawsuit. *Cf. id.* at 654 ("Because punitive damages are properly recoverable for each individual injury only if all of the elements of the underlying cause of action are present and there are no affirmative defenses, the defendant must be permitted to contest causation and other elements of the alleged tort on an individual basis with respect to the victim and to raise all affirmative defenses that it has against particular victims."). This essentially means that the defendant is subject to all of the downside of class action litigation without any of its corresponding procedural upside. *See Williams*, 378 F.3d at 797 ("Where there has been a pattern of illegal conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants. Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff, however, deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.").[10]

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[10] *See also* Colby, *supra*, 87 MINN. L. REV. at 655 ("[U]nder current law, if all of the victims were to join together in a class action, the defendant would be spared the expense of paying either compensatory damages or punitive damages for any class members

Thus, although "[t]he other wrongs allegedly resulting from the same course of [defendant's] conduct will be treated only peripherally and painted with a very broad brush" at trial, "[t]he jury will be permitted to punish the defendant for the whole lot of them." Colby, *supra*, 87 MINN. L. REV. at 654.

That state of affairs conflicts with the most elementary notions of due process. As this Court has held, " '[d]ue process requires that there be an opportunity to present every available defense.' " *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *American Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)). Indeed, if defendants are "barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would * * * be unconstitutionally deprived of their opportunity to be heard." *National Union Fire Ins. Co. of Pittsburgh* v. *City Sav., F.S.B.*, 28 F.3d 376, 394 (3d Cir. 1994). Consequently, juries cannot be permitted to award damages to individual plaintiffs based on speculative harms to non-parties consistent with basic protections afforded by the Due Process Clause.

B. Permitting Punitive Damages To Be Based On Theoretical Harms To Non-Parties Results In Excessive Punishment And Over-Deterrence.

Allowing a single plaintiff or a set of plaintiffs to recover a punitive award that reflects the entire harm caused by a defendant's course of conduct disregards the fact that other plaintiffs—in the same or other jurisdictions—may also bring suit and seek punitive damages. The consequence of such an approach is that a defendant is likely to be punished and deterred over and again for a single course of conduct—and increasingly severely, for "[o]ne excessive verdict, permitted to stand, becomes precedent for another still larger one." *Consorti* v. *Armstrong World Indus., Inc.*, 72 F.3d 1003, 1010 (2d Cir. 1995), *vacated & remanded on other grounds*, 518 U.S. 1031 (1996). The ineluctable result is thus punitive

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who could not individually establish their underlying cause of action."); *see generally* Fed. R. Civ. P. 23.

damages overkill—too much punishment, too much deterrence.

Various authorities have recognized that this problem bears a constitutional aspect. *See, e.g., Racich* v. *Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989); *In re School Asbestos Litig.*, 789 F.2d 996, 1003-1005 (3d Cir. 1986); *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839-840 (2d Cir. 1967). This Court has also voiced concern about it. In *State Farm*, the Court observed that punishment for harms done to others "creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." 538 U.S. at 423. *See also Gore*, 517 U.S. at 593 (Breyer, J., concurring) (noting that "[l]arger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover").

But the solution to the problem proposed by the Oregon Supreme Court in the ruling under review—*i.e.*, that a defendant can simply pay an award now and receive credit for it in later litigation—is neither novel nor realistic. Nearly 40 years ago, Judge Friendly memorably identified its flaws. He explained that "whatever the right result may be in strict theory, we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare." *Roginsky*, 378 F.2d at 840.

Aside from explaining that such an approach is unrealistic in practice, Judge Friendly also recognized that it inherently fosters inequity among the injured. *See id.* at 839-840 ("Neither does it seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers" because "most laymen and some judges would have some difficulty in understanding why presumably equally worthy plaintiffs in the other 75 cases before Judge Croake or elsewhere in the country should get less or none."). He is not

the only authority to question an approach that deprives future plaintiffs of their rightful share of punitive damages.[11]

Such an approach would discourage some plaintiffs from bringing suit for their injuries. *See* Colby, *supra*, MINN. L. REV. at 595 (unavailability of punitive damages may deter plaintiffs with low potential compensatory damages from suing). It also would encourage others to engage in a race to judgment, *see, e.g., Davis* v. *Celotex Corp.*, 420 S.E.2d 557, 565 (W. Va. 1992) ("[T]hose plaintiffs whose cases were heard first would gain the punitive monetary advantage."); Colby, *supra*, MINN. L. REV. at 595 (noting that punitive damages awarded to first-comers may bankrupt the defendant).

The Eighth Circuit recently identified a solution to this problem—a solution mandated by this Court's jurisprudence. That court explained that only "[t]ying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct." *Williams*, 378 F.3d at 797. Otherwise, "[i]f a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award." *Id.*

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[11] *See, e.g., Jackson* v. *Johns-Manville Sales Corp.*, 781 F.2d 394, 405 (5th Cir. 1986) (en banc) ("We believe that the Mississippi Supreme Court would not deny to its own citizens the right to recover that which citizens of dozens of other states are already entitled to recover."); *W.R. Grace & Co.* v. *Waters*, 638 So.2d 502, 505 (Fla. 1994) (court not willing to "place Floridians injured by asbestos on an unequal footing with the citizens of other states with regard to the right to recover punitive damages from companies who engage in extreme misconduct").

C. Punitive Exactions That Reflect Assumed Harms To Non-Parties Allow A Single Aberrant Jury To Override The Decisions Of Other Juries And Governmental Regulators.

The flip side of the duplicative punishment concern is the equally disturbing fear that—if juries are permitted to punish for the universal harm a product may have caused—a manufacturer may be punished for the entire supposed harm caused by a product defect that other juries, judges and federal regulators have found not to constitute a defect at all.

This is a problem that automobile manufacturers know too well, as noted above. In *Sand Hill Energy, Inc.*, *supra*, 83 S.W.3d 483 (Ky. 2002), the Supreme Court of Kentucky reinstated a $15 million punitive damages award for a Ford transmission design that NHTSA declined to find defective. And juries in 15 other jurisdictions also concluded that the transmission's design did not contain a defect.

The case of *Ford Motor Co.* v. *Ammerman*, 705 N.E.2d 539 (Ind. Ct. App. 1999), presents yet another troubling example of the problem posed by aberrant awards of punitive damages based on the assumed total harm caused by a product. Plaintiffs were ejected and seriously injured when the Bronco II in which they were passengers rolled over after it swerved to avoid colliding with another vehicle. *See id.* at 549. They alleged that the Bronco II was defective because its narrow track width and high center of gravity made it too susceptible to rolling over. *See id.* at 546. The jury found for plaintiffs, awarding more than $4 million in compensatory damages and a $58 million punitive award. *See id.* at 549. The trial court reduced that exaction to $13.8 million—a figure "represent[ing] Ford's retooling costs, along with an additional $54.00 representing the cost for additional hardware installed on each vehicle." *Id.* at 559. While other juries returned defense verdicts in Bronco II rollover cases, the reviewing court concluded the award was "not excessive." *Id.* at 564.

As with the multiple punishment problem, this one obviously cannot be solved by a pay now, credit later approach either—there may not be another successful plaintiff from whom a manufacturer could seek, let alone obtain, credit for punitive damages already paid to others. The upshot is that "a defendant that loses a single case would also lose the benefit of all previous victories against the same claim of misconduct." *Johnson* v. *Ford Motor Co.*, 113 P.3d 82, 94-95 (Cal. 2005).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Oregon should be reversed.

Respectfully submitted,

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
PAUL A. WERNER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

JOHN T. WHATLEY
ALLIANCE OF AUTOMOBILE MANUFACTURERS
1401 Eye Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 326-5548

Counsel for Amicus Curiae

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IN THE

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PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OREGON

BRIEF OF AKHIL REED AMAR AND ARTHUR McEVOY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ARTHUR MCEVOY
975 Bascom Mall
Madison, WI 53706
(608) 265-4771

KENNETH CHESEBRO*
1770 Massachusetts Ave., #201
Cambridge, MA 02138
(617) 661-4423

MICHAEL J. PIUZE
LAW OFFICES OF MICHAEL J. PIUZE
11755 Wilshire Blvd., Suite 1170
Los Angeles, CA 90025
(310) 312-1102

Counsel for Amici Curiae

*Counsel of Record

September 15, 2006

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Interest of *Amici Curiae*

This brief is submitted by two law professors who in their past work have analyzed various aspects of legal history pertinent to the remedy of punitive damages, also known as "exemplary damages."[1] *Amici* respectfully suggest that this brief may be of use to the Court as a counterpoint to the analysis of legal history contained in the Brief for the Petitioner ("Pet. Br.") and in the Brief of the American Tort Reform Association as *Amicus Curiae* in Support of Petitioner ("ATRA Br.") (ATRA's analysis is adopted by Philip Morris in Pet. Br. at 19 n.7).[2]

Akhil Reed Amar, the Southmayd Professor of Law and Political Science at Yale University, teaches constitutional law, federal jurisdiction, and legal history, among other subjects. He has published extensively on the history surrounding the drafting and ratification of the Constitution and of the Bill of Rights, devoting significant attention to historical matters relating to the role of the jury. He is a co-editor of a leading constitutional law casebook, *Processes of*

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[1] Given its historical focus, this brief uses the term "exemplary damages" to refer to what today are typically termed "punitive damages." "Exemplary damages" is a term English common-law courts began using in the 1760s to refer to extra-compensatory damages designed to punish intentional wrongs and thereby deter their future commission by "making an example" of the offender for others to heed. The term "punitive damages," which did not come into regular use until a century later, tends to obscure the deterrence-based origin and function of such damages by suggesting their principal function is "punishment," in the sense of retribution, that is, for its own sake. Thus we use the older term, which more accurately reflects a principal original function of such extra-compensatory damages, deterrence (both specific and general deterrence).

[2] All parties have consented to the filing of this brief (the parties' blanket consents having been lodged with the Clerk). No counsel for a party has written this brief in whole or in part. Indeed, this brief has been independently researched and written; no counsel for any party or any other *amicus* has seen drafts. No person or entity other than *amici curiae* and their counsel has made a monetary contribution to the preparation or submission of this brief.

Constitutional Decisionmaking, and the author of numerous law review articles. His several books include, most recently, *America's Constitution: A Biography* (Random House, 2005); and *The Bill of Rights: Creation and Reconstruction* (Yale University Press, 1998).

Arthur McEvoy, the J. Willard Hurst Professor at the University of Wisconsin Law School, teaches American legal history and torts and has published extensively in the fields of American history and American legal history. He was a professor of history at Northwestern University from 1980 to 1993, and a research fellow at the American Bar Foundation from 1989 to 1994. He has a particular interest in the history of judicial review of jury verdicts in the United States, and was counsel of record on an *amicus* brief filed by legal historians on that issue which this Court cited in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 422 n.2 (1994).

Introduction and Summary of Argument

Philip Morris and ATRA make three basic arguments concerning the history of exemplary damages:

1. Through the second half of the 1800s, American courts were sharply divided over the very existence of an exemplary damages remedy — over the threshold question of "whether damages could *ever* properly be imposed for purposes of punishment," even where the only harm considered was harm done specifically to the plaintiff. Pet. Br. at 18 (emphasis added). *See also* ATRA Br. at 8 & n.5.

2. Once "[c]ourts gradually began to accept that damages could be used to punish as well as compensate," they focused on "the distinct harm to the party before the court." Pet. Br. at 18. This approach reflected the "general consensus that punitive damages may be imposed *only* to punish for the harm to the party before the court . . . ." Pet. Br. at 19 (emphasis added). *See also* ATRA Br. at 5-12. "For almost the entirety of their existence, punitive damages were awarded only as punishment for harm to the specific person bringing the claim." Pet. Br. at 17. *See also* ATRA

Br. at 12 ("punitive damages were never understood as a mechanism for vindicating affronts to society generally (or for that matter to anyone other than the plaintiff)").

3. Through "several centuries of Anglo-American legal history, . . . low-single-digit ratios of punitive to compensatory damages have always been the norm," Pet. Br. at 35 — a norm which "persisted throughout the 19th century and much of the 20th." Pet. Br. at 38. "Astronomical punitive damages awards yielding multi-digit ratios are a phenomenon that has emerged only recently. Such awards have no basis in common-law history." Pet. Br. at 38 (footnote omitted). *See also* ATRA Br. at 21-30.

Part I of this brief demonstrates that each of the three basic points urged by Philip Morris and ATRA is flawed.

There was no "sharp" division over the existence of an exemplary damages remedy through 1899. The existence and validity of this remedy was well established by the early 1800s under the common law of both England and America, as Chancellor Kent contemporaneously observed.

Exemplary damages have never been limited only to the consideration of harms done to the plaintiff. Nor were exemplary damages historically confined to a low, single-digit multiple of actual damages. From the beginning, courts justified exemplary damages in significant part as a mechanism to deter intentional wrongdoing and, at least in cases founded on deterrence (we do not consider cases founded on retribution), the ratio between exemplary and compensatory damages was of little significance.

Exemplary damages set at "astronomical" multiples of the particular plaintiff's actual damages are no modern phenomenon. At least with regard to deterrence-based exemplary damages, such awards have been a hallmark of this common-law remedy from its inception. The whole point of the 1763 litigation pursued by John Wilkes and his allies against government agents which led to the earliest decisions was to use the threat of enormous exemplary damages awards to deter sweeping invasions of privacy effected pursuant to general warrants. Lord Chief Justice Charles Pratt (later made Lord Camden) upheld enormous

exemplary damages in the cases involving Wilkes as an appropriate means of deterring harm to others, and to society generally. Lord Camden specifically rejected the government's argument that exemplary damages should not be used for purposes of deterrence.

The exemplary damages cases involving Wilkes were well known to the Founding generation. Wilkes and Lord Camden were lionized in part for their role in these cases. It is therefore no surprise that Lord Camden's approach to exemplary damages, including his focus on deterrence, was retained by the state courts after independence as part of their "reception" of the English common law. A handful of state courts, many decades later, altered their common law to bar exemplary damages. But in the states which *did* continue to permit exemplary damages (the vast majority), courts accepted Lord Camden's fundamental insight that exemplary damages should be based not simply on the harm that had been done to the plaintiff but should also take account of harm to others, and to society in general, and be set at levels adequate to deter such harm in the future.

Part II of this brief addresses a separate but related matter raised by Philip Morris and ATRA: the proper division of authority between judge and jury. ATRA argues that historical practice does not shield jury-awarded exemplary damages "from exacting constitutional scrutiny," ATRA Br. at 30, and Philip Morris goes so far as to argue that "long-established practice" requires that "when the compensatory damages are substantial, the constitutional maximum punishment is between zero and four times the amount of compensatory damages." Pet. Br. at 9. However, the historical practice of the English courts dating back to 1763, and of the American courts during the 19th century, was to defer heavily to jury determinations of exemplary damages. Both as a matter of tradition as it existed when the Fourteenth Amendment was enacted in 1868 and, even more fundamentally, in light of the Seventh Amendment enacted in 1791, the type of *de novo* or weight-of-the-evidence review of exemplary damages which Philip Morris and ATRA appear to champion is untenable.

Argument

I. History Supports the States' Use of Exemplary Damages to Deter Wrongdoing Generally, Not Just to Vindicate Harms to Particular Plaintiffs

Philip Morris's historical account is as follows. Through 1899 there was sharp division among American courts and commentators over the very existence of an exemplary damages remedy. Pet. Br. at 18. Once American courts gradually did begin to permit exemplary damages, there developed a general consensus that *only* the harm to the plaintiff in the particular case could be considered, and that exemplary damages should be strictly confined to punishing for harm to *that plaintiff*. Pet. Br. at 17-19. Exemplary damages awarded at multi-digit ratios above actual damages were unknown until recently. Pet. Br. at 35, 38.

Philip Morris's arguments are contrary to the historical record. As Chancellor Kent contemporaneously observed, exemplary damages were a well-established part of both English and American common law by the early 1800s. From their beginnings in the mid-1700s, they have been awarded in large part not merely to punish for, or vindicate, harm to the plaintiff, but to deter harms against others, and against society generally — and at multi-digit ratios far above the actual damages if found necessary for deterrence.

A. Early English Cases

Exemplary damages were first formally recognized as a separate category of common-law damages in 1763, in the landmark English cases involving the government's targeting of John Wilkes for the alleged publication of *North Briton*, No. 45. Wilkes was a Member of Parliament and part of one of the Whig factions (led by William Pitt the Elder) which fell into opposition to the government following the accession of King George III in 1760, and which was fighting the efforts of other factions desiring to enhance the King's powers and to negotiate a peace treaty with France.

The most notorious of the *North Briton* issues (which, while published anonymously, were widely assumed to be written chiefly by Wilkes) was *North Briton*, No. 45. It depicted the King as the unwitting puppet of corrupt ministers who were being covertly led by a Scottish lord who owed his influence to an amorous connection with the King's mother.[3]

Beyond his extraordinary abilities as a propagandist and satirist, Wilkes was trained as a lawyer,[4] and was a capable administrator (later serving with distinction as sheriff, lord mayor, and chamberlain of London).[5] When the King and government ministers attacked *North Briton*, No. 45, as seditious and treasonous, and launched searches and seizures targeting dozens of individuals pursuant to general warrants in an effort to obtain evidence that Wilkes was its author, Wilkes drew on those skills to manage and finance a series of lawsuits against government ministers and agents seeking tort damages. Through their lawsuits, Wilkes and his allies "recovered a King's ransom from civil juries to teach arrogant officialdom a lesson and to deter future abuse," and Wilkes became a hero of liberty and democracy[6] — a reputation enhanced by Wilkes's later use

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[3] *See generally* ARTHUR R. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 38-43, 49-50, 56-57, 60-62, 65-100 (2006); JOHN SAINSBURY, JOHN WILKES: THE LIVES OF A LIBERTINE xiv-xv, 45-70 (2006); LOUIS KRONENBERGER, THE EXTRAORDINARY MR. WILKES: HIS LIFE AND TIMES 16-35 (1974); GEORGE F. E. RUDÉ, WILKES AND LIBERTY: A SOCIAL STUDY 18-23 (1962); CHARLES CHENEVIX TRENCH, PORTRAIT OF A PATRIOT: A BIOGRAPHY OF JOHN WILKES 56-99 (1962); RAYMOND WILLIAM POSTGATE, THAT DEVIL WILKES 4-5, 10-17, 30-36, 46-51 (1929).

[4] CASH, *supra* note 3, at 12, 16, 21; SAINSBURY, *supra* note 3, at x, 8.

[5] CASH, *supra* note 3, at 292-94, 308-14, 351-52, 378; KRONENBERGER, *supra* note 3, at 138-44, 157-60, 187-88; TRENCH, *supra* note 3, at 290-94, 315-22; POSTGATE, *supra* note 3, at 180-82, 187-95, 212-16, 229-31; WILLIAM PURDIE TRELOAR, WILKES AND THE CITY 107, 124-49, 193-208 (1917).

[6] AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 29, 194 n.146 (1997). *See also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 70-71 & n.* (1998);

of similarly aggressive tactics to win landmark victories for the freedom of the press[7] and the freedom of the ballot.[8]

One of the cases sparked by *North Briton*, No. 45, *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), involved a claim for exemplary damages made by a journeyman printer suspected of involvement with its printing. Huckle was detained for only six hours. Money and the other government agents treated him "rather well, feeding him 'beef steakes and beer, so that he suffered very little or no damages' . . . . [T]he jury awarded him £ 300, an enormous sum almost 300 times the plaintiff's weekly wage." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 421 (1994) (quoting *Huckle*, 95 Eng. Rep. at 768). Lord Chief Justice Charles Pratt (later made Lord Camden) upheld the award in full on the basis that the case involved not simply "the mere personal injury" of the plaintiff, but also the liberty of "all the King's subjects" against the exercise of "arbitrary power," so that the jury had "done right in giving exemplary

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CASH, *supra* note 3, at 100-16, 131-33, 161-62, 371-72; SAINSBURY, *supra* note 3, at xv; KRONENBERGER, *supra* note 3, at 36-44, 250; RUDÉ, *supra* note 3, at 23-30, 34, 193-98; TRENCH, *supra* note 3, at 88-128, 163, 370-72; POSTGATE, *supra* note 3, at 51-61.

[7] Wilkes's exploitation of certain prerogatives of the London courts brought about, for the first time in English history, the ability of newspapers to provide coverage of the proceedings of Parliament. KRONENBERGER, *supra* note 3, at 130-35; RUDÉ, *supra* note 3, at 155-65, 194; TRENCH, *supra* note 3, at 279-85, 371; POSTGATE, *supra* note 3, at 173-77; TRELOAR, *supra* note 5, at 113-23.

[8] After years of effort, Wilkes established the right of voters to send as their representative to the legislature whomever they wished (even Wilkes, voted into Parliament once while under a sentence of outlawry, and thrice while imprisoned), a principle upon which this Court drew in *Powell v. McCormack*, 395 U.S. 486, 527-31 (1969). *See also* CASH, *supra* note 3, at 179, 208-13, 221-22, 224-27, 237-38, 242, 246-58, 305, 310, 316-18, 369-71; SAINSBURY, *supra* note 3, at xvi-xvii; KRONENBERGER, *supra* note 3, at 88-93, 99-101, 120-26, 128-29; RUDÉ, *supra* note 3, at 41-75, 105-07, 111, 194; TRENCH, *supra* note 3, at 214-24, 231-34, 237-51, 312-13, 370-71; POSTGATE, *supra* note 3, at 121-27, 132-47, 198-200, 224.

damages." 95 Eng. Rep. at 768-69.[9]

A case brought by Wilkes sought to hold the government accountable for searching his home under a general warrant, in its effort to uncover evidence that Wilkes had authored *North Briton*, No. 45. *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763). Wilkes specifically focused the case on deterrence, which was the whole point of the coordinated litigation effort. Arguing "that the case extended far beyond Mr. Wilkes personally" to "touch[] the liberty of every subject," Wilkes's counsel urged an award of "large and exemplary damages" because "trifling damages would put no stop to such proceedings . . . ." *Id.* at 490. Lord Camden charged the jurors that they had "it in their power to give damages for more than the injury received" so as "to deter from any such proceeding for the future . . . ." *Id.* at 498-99.

In so charging the jury, Lord Camden specifically rejected the Solicitor General's argument "[t]hat damages should always be reckoned according to the injury received," *id.* at 494, and his argument that the public interest could *only* be protected through criminal proceedings, not through jury-awarded damages. *Id.* at 493 ("This was the first time he ever knew a private action represented as the cause of all the good people of England. If the constitution has, in any instance, been violated, the Crown must be the prosecutor, as it is in all criminal cases."). So charged, the jury awarded Wilkes £ 1000, more than three times the enormous sum awarded the journeyman printer. *Id.* at 499.[10]

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[9] The "enormous" (to use this Court's description) exemplary damages award upheld on little or no damages in *Huckle v. Money* refutes the argument that "[a]stronomical punitive damages awards yielding multi-digit ratios are a phenomenon that has emerged only recently," and they "have no basis in common-law history." Pet. Br. at 38. *Compare* Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1180 & n.10 (1931) (noting 75 years ago that "punitive damages many times as great as the actual damages have been affirmed").

[10] As Lord Camden's analysis makes clear, both *Huckle v. Money* and *Wilkes v. Wood* refute the argument made to this Court that the focus of exemplary damages has always been on "the distinct harm to the party

Between 1764 and American independence, building on *Huckle v. Money* and *Wilkes v. Wood*, the English courts sustained other exemplary damages awards in a variety of contexts, typically involving powerful elites who abused their power against ordinary people, justifying exemplary damages as a means of deterring future such abuses. *E.g.*, *Beardmore v. Carrington*, 95 Eng. Rep. 790 (K.B. 1764); *Grey v. Grant*, 95 Eng. Rep. 794 (C.P. 1764); *Benson v. Frederick*, 97 Eng. Rep. 1130 (K.B. 1766); *Tullidge v. Wade*, 95 Eng. Rep. 909 (C.P. 1769); *Bruce v. Rawlins*, 95 Eng. Rep. 934 (C.P. 1770); *Sharpe v. Brice*, 96 Eng. Rep. 557 (C.P. 1774).

B. Early American Cases

Citing an 1899 treatise, Philip Morris argues that "[t]hroughout the second half of the 19th century, courts and commentators were sharply divided over whether damages

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before the court." Pet. Br. at 18; *see also* Pet. Br. at 17 ("For almost the entirety of their existence, punitive damages were awarded only as punishment for harm to the specific person bringing the claim."); ATRA Br. at 12 ("punitive damages were never understood as a mechanism for vindicating affronts to society generally (or for that matter anyone other than the plaintiff)"). As our discussion below demonstrates in detail, this argument by Philip Morris and ATRA ignores the well-settled deterrence function of exemplary damages, one specifically relied upon in the original 1763 decisions and in many later decisions.

Similarly flawed is the analysis set forth in a law review article heavily relied upon by Philip Morris and ATRA for their historical argument, Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003) (cited in Pet. Br. at 12, 18, 38 n.25; ATRA Br. at 5, 9-12, 23). Despite the explicit deterrence rationale of *Huckle v. Money*, *Wilkes v. Wood*, and many later cases, Colby argues that courts have always conceived of exemplary damages "as punishment for the private legal wrong — the insult — done to the individual plaintiff." *Id.* at 619. Last year the California Supreme Court rejected Colby's "restrictive historical view of the *purposes* of punitive damages," explaining that accepting "such a narrow view" would "blind state juries and courts to the state's public interest in deterring a wrongful course of conduct." *Johnson v. Ford Motor Co.*, 113 P.3d 82, 91-92 (Cal. 2005).

could *ever* properly be imposed for purposes of punishment." Pet. Br. at 18 (emphasis added) (citing 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253, at 240-50 (William Draper Lewis ed., 16th ed. 1899)). But as this Court has previously observed, "the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted," *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991), a point which was "made clear" in 1851 by *Day v. Woodworth*, 54 U.S. 363 (1851). *Id.* That observation was a correct one.

Because the exemplary damages remedy was well established under the common law of England prior to American independence, it automatically became part of the common law of nearly all states (both the thirteen original states and those later admitted) due to their "reception" of the English common law.[11] Of course, the English common law was not imported wholesale in America. There was no slavish adherence to English common law as a technical

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[11] "Resisting the claim that the American plantations were 'conquered' territory and as such not entitled to the benefits of English law, the colonists largely succeeded after 1720 in establishing the proposition that they carried the English common law with them." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 6 (1977) (citations omitted). "[T]he first Continental Congress in 1774 . . . maintain[ed] that Americans were 'entitled to the common law' . . . ." *Id.* at 4, 270 n.16 (quoting 1 *Journals of the Continental Congress* 69 (1904)). "Between 1776 and 1784, eleven of the thirteen original states adopted, directly or indirectly, some provision for the reception of the common law as well as of limited classes of British statutes," with the final two states following in 1798 and 1818. *Id.* at 4, 270 n.18 (citing E. BROWN, BRITISH STATUTES IN AMERICAN LAW, 1776-1836, at 24 (1964)). *See also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 66-70, 112 (3d ed. 2005).

Nor was reception of the English common law limited to the thirteen original states. The Northwest Ordinance of 1787 mandated "judicial proceedings according to the course of the common law" — that is, the common law of England. *E.g.*, *Penny v. Little*, 4 Ill. (3 Scam.) 301, 302-05 (1841). Virtually all the states admitted to the union after the Revolution adopted the common law of England, with the date of reception typically either left unspecified or set at 1776. *See* Joseph Fred Benson, *Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri*, 67 MO. L. REV. 595, 607-11 (2002) (catalog of provisions compiled by Missouri's judicial archivist).

system, and there was enough distrust of some English common-law principles that American judges felt latitude to reject them as seemed warranted. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 132-37 (1996) (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting) (citing numerous sources). But the particular principle animating the exemplary damages doctrine — the need to provide a remedy for common people to deter intentional wrongs by powerful elites, in a proceeding administered by jurors who would be difficult for elites to covertly influence — was hardly the subject of distrust in America.

After all, the exemplary damages remedy had first been formally recognized in the famous cases involving John Wilkes and Lord Camden, which added greatly to their status as "folk heroes in the colonies."[12] The various cases involving Wilkes can be thought of "as the *Brown v. Board of Education* of their day; and Lord Chief Justice Camden as the Earl Warren of his era." Akhil Reed Amar, *Foreword: Lord Camden Meets Federalism — Using State Constitutions to Counter Federal Abuses*, 27 RUTGERS L.J. 845, 846 (1996). Indeed, the exemplary damages remedy played a part in the dispute over ratification of the Constitution, particularly over whether ratification should be conditioned on a Bill of Rights guaranteeing the right to trial by jury in civil cases, on the view that "[t]he prospect of jury oversight and jury-

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[12] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 66-67 (1998). As this Court has noted: "Wilkes' struggle and his ultimate victory had a significant impact in the American colonies. His advocacy of libertarian causes and his pursuit of the right to be seated in Parliament became a *cause célèbre* for the colonies. '[T]he cry of "Wilkes and Liberty" echoed loudly across the Atlantic Ocean as wide publicity was given to every step of Wilkes's public career in the colonial press. . . . [Colonials] saw him as a popular hero and a martyr to the struggle for liberty. . . . They named towns, counties, and even children in his honour.'" *Powell v. McCormack*, 395 U.S. 486, 530-31 (1969) (quoting 11 L. GIPSON, THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION 222 (1956)). *See also* CASH, *supra* note 3, at 231-34, 259-60, 263-64 (noting the prominent revolutionaries who wrote Wilkes in admiration, including John Adams, Samuel Adams, John Hancock, and James Otis); POSTGATE, *supra* note 3, at 162-69, 206-07 (same).

awarded punitive damages would powerfully deter government officials contemplating unreasonable conduct."[13]

Given the historical pedigree of the English common law exemplary damages precedents and the reception of the English common law by the new American states, it is unsurprising that in the decades following independence, state after state confirmed the existence of an exemplary damages remedy under the common law, in accord with the English cases establishing this remedy. Some examples:

In 1784, a South Carolina court upheld the exemplary damages received by the victim of a practical joke. The defendant, a physician, first staged a fake duel with the intoxicated victim, and then slipped a diuretic into the wine

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[13] AMAR, *supra* note 12, at 70; *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 233-34, 329-30 (2005); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 14-15, 29 (1997). For example, explaining the need for civil jury trials, one Pennsylvania Anti-Federalist noted that if a federal officer searching "for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift . . . a trial by jury would be our safest resource, heavy damage would at once punish the offender and deter others from committing the same: but what satisfaction can we expect from a lordly [judge] always ready to protect the officers of government against the weak and helpless citizens." *Essay of a Democratic Federalist, reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, 61 (Herbert J. Storing ed., 1981). Similarly, the prominent Anti-Federalist essayist "Maryland Farmer" noted: "[N]o remedy has yet been found equal to the task of deterring and curbing the insolence of office, but a jury — [i]t has become an invariable maxim of English juries, to give ruinous damages whenever an officer had deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression." *Essays by a Farmer (I), reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 5, 14 (Herbert J. Storing ed., 1981). On the importance and meaning of the Seventh Amendment, *see generally* Alexander Hamilton, *Federalist No. 83*, at 499 (Clinton Rossiter ed., 1961) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury"); *Parklane Hoisiery Co. v. Shore*, 439 U.S. 322, 339-46 (1979) (Rehnquist, J., dissenting); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, The Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 148-60 (1991); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653-710 (1973).

he offered the victim for a "reconciliation" toast. The defendant insisted it was all "a drunken frolic, and no injury was seriously intended," but the court upheld the plaintiff's "very exemplary damages," especially because the physician "could not plead ignorance of the operation, and powerful effects of this medicine." *Genay v. Norris*, 1 S.C.L. (1 Bay) 6, 6 (S.C. Com. Pl. Gen. Sess. 1784).

In 1790, a Maryland court upheld a sizable damages award in an ejectment action in a case in which the plaintiff's counsel admitted the actual damages "were insignificant," but argued "the entry and ouster was so violent as to deserve exemplary damages," which the jury "gave such as should deter others from such proceedings . . . ." *Joan v. Joshua Shield's Lessee*, 3 H. & McH. 7, 8 (Md. Gen. Oct. Term 1790).

In 1791, in a New Jersey lawsuit alleging seduction and breach of promise of marriage, a jury was charged "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example*'s sake, to prevent such offences in [the] future . . . ." *Coryell v. Colbaugh*, 1 N.J.L. (1 Coxe) 77 (N.J. 1791).

In 1808, the Pennsylvania Supreme Court upheld a "severe" damages award against a sheriff for his deputy's invalid levy of property from the administrator of an estate. Even though "the actual injury was nothing," the court held the jury could properly "have thought it a necessary check to rude and improper behaviour of the sheriff and his officers. . . . [T]he happiness of society requires that these officers should be influenced by powerful motives to avoid all acts of rudeness and wanton injury." *Hazard v. Israel*, 1 Binn. 240, 246 (Pa. 1808). *Compare* note 13, *supra*.

The 1808 New York decision in *Tillotson v. Cheetham*, 3 Johns. 56 (N.Y. 1808), upheld an exemplary damages award for libel. Written by Chief Justice (later Chancellor) James Kent, it termed the exemplary damages doctrine "well settled" in America. Kent saw no need for lengthy exposition. He summarized several exemplary damages decisions (including *Huckle v. Money*) and then concluded:

> But it cannot be requisite to multiply instances in which the doctrine, contained in this part of the charge, has received the sanction of the *English* and of the *American* courts of justice. It is too well settled in practice, and is too valuable in principle, to be called into question.

Id. at 64-65.

A 1818 maritime decision by this Court reflected the sharp distinction which had developed between compensatory and exemplary damages, in specifying the damages owed by the owners of a privateer who were constructively liable for an illegal seizure. The owners were liable "for all the injuries and losses actually sustained" on account of the illegal seizure, "but they are not bound to the extent of vindictive damages" — although in a suit against the crew of the privateer, "it might be proper to go yet further, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless conduct." *The Amiable Nancy*, 16 U.S. 546, 558-59 (1818) (Story, J.).

In 1818, emphasizing the deterrent function of exemplary damages, a South Carolina court rejected an attack on a jury verdict for slander: "Exemplary damages are the only means of bridling licentious tongues." *Hogg v. Wilson*, 1 Nott & McC. 216, 216 (S.C. Const. 1818).

In 1836, reiterating its stance on exemplary damages and citing English decisions, the Pennsylvania Supreme Court stated: "Whatever be the speculative notions of fanciful writers, the authorities teach that damages may be given, in peculiar cases, not only to compensate, but to punish. * * * That corrective damages may be given for the sake of example, is as old as the law itself." *McBride v. McLaughlin*, 5 Watts 375, 376-77 (Pa. 1836).[14]

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[14] The "fanciful" writer the court had in mind apparently was Theron Metcalf, a Boston lawyer who six years earlier had published an article arguing a radical new theory concerning the exemplary damages doctrine. Metcalf's article is relied on by ATRA's *amicus* brief filed in support of Philip Morris (ATRA Br. at 17-18), and in the chief law review article relied on by Philip Morris and ATRA (Colby, *supra* note 10, at 617 n.119),

In 1839, the highest court of New Hampshire, in a case involving harm caused by an unsafe bridge, upheld a jury charge that "if the defendants had been guilty of *gross negligence*, . . . [the jurors] might, in their discretion, give the plaintiff exemplary damages." *Whipple v. Walpole*, 10 N.H. 130, 133 (1839). It cited both English authority and Chancellor Kent's 1808 analysis of the well-settled nature of the doctrine, concluding a jury may award "damages beyond the actual injury sustained, for the sake of the example . . . ." *Id.* at 132.

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with no acknowledgment of its radical, indeed, fanciful, nature.

Despite the preceding half century of both English and American decisions authorizing the use of exemplary damages to punish and deter intentional wrongdoing, Metcalf argued that "neither on principle, nor by the preponderance of authority, can damages be estimated by any other standard than the actual injury received . . . ." Theron Metcalf, *A Reading on Damages in Actions Ex Delicto*, 3 AM. JURIST & LAW MAG. 287, 288 (1830). As to principle, he argued: "There would seem to be no reason why a plaintiff should receive greater damages from a defendant who has intentionally injured him, than from one who has injured him accidentally, his loss being the same in both cases." *Id.* at 292. As to precedent, he asserted that only "a few decisions and dicta," advancing a "preposterous and unjust" doctrine, cut against his thesis. *Id.* at 304, 306. These admittedly included Chancellor Kent's decision in *Tillotson* stating that the exemplary damages doctrine was "well settled" by 1808, which Metcalf conceded was "highly respectable" authority. Yet, he insisted, Chancellor Kent had misread the relevant English cases. *Id.* at 306-08.

Not surprisingly given its radical thesis and tendentious reading of precedent, Metcalf's analysis had little if any impact in the 19th century. It was cited in only three court decisions (according to a Westlaw search), each of which rejected the position argued by Metcalf. *McWilliams v. Bragg*, 3 Wis. 377, 379 (1854); *Taylor v. Grand Trunk Ry. Co.*, 48 N.H. 304, 319 (1869); *Goddard v. Grant Trunk Ry. of Canada*, 57 Me. 202, 220 (1869). Metcalf is, however, enjoying a remarkable renaissance in the 21st century. ATRA, for example, now refers to Metcalf's article (written for a legal journal that went out of business 163 years ago) as a "treatise." ATRA Br. at 17. To ATRA, anyone who cites Metcalf for his (accurate) description of "the precise doctrine advanced" by mainstream thinkers, 3 AM. JURIST & LAW MAG. at 287 (language replaced with ellipses in ATRA Br. at 17) — rather than citing his fanciful view that exemplary damages "did not exist," ATRA Br. at 18 — is making a "flatly misleading reference to an 1830 treatise." ATRA Br. at 17.

In two 1842 decisions, the highest court of Connecticut emphasized the well-settled nature of the doctrine. *Linsley v. Bushnell*, 15 Conn. 225, 236 (1842) ("There is no principle better established, and no practice more universal, than that vindictive damages, or smart money, may be, and is, awarded, by the verdicts of juries, in cases of wanton or malicious injuries"); *Huntley v. Bacon*, 15 Conn. 267, 273 (1842) (upholding exemplary damages charge; its propriety "has been too frequently and too recently sanctioned, by this court, to be again drawn into discussion or doubt").

In 1842, Abraham Lincoln successfully defended on appeal an exemplary damages award for seduction: "In vindictive actions, and this is now regarded as one, the jury are always permitted to give damages for the double purpose of setting an example, and of punishing the wrong-doer." *Grable v. Margrave*, 4 Ill. (3 Scam.) 372, 373 (1842).

In 1847, the status of exemplary damages under American law was reviewed in the first treatise on damages published in the United States, by Theodore Sedgwick, a leading member of the New York bar.[15] The treatise, which Sedgwick wrote at Justice Story's urging,[16] was "the most brilliant and boldly innovative American antebellum legal

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[15] Although his career was cut short by his untimely death in his late 40s, Sedgwick cosponsored David Dudley Field's codification efforts; worked with Field and Samuel J. Tilden in Democratic party politics; served as co-counsel with John Quincy Adams in *The Amistad* Case, 40 U.S. 518 (1841); served as U.S. Attorney for New York; and produced three editions of the seminal American treatise on damages. *See generally* ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 187-88, 233-34, 315, 463, 468, 482 (1945); HOWARD JONES, MUTINY ON THE AMISTAD: THE SAGA OF A SLAVE REVOLT AND ITS IMPACT ON AMERICAN ABOLITION, LAW, AND DIPLOMACY 40, 68, 80, 219 (1987).

[16] Justice Story wrote Sedgwick that "a thorough analysis of the whole subject, with all the lights of the modern authorities" would have "great utility to the profession," as there existed "no book that treats of the subject at once fully, accurately, and with suitable distinctions and expositions of principle." Letter from Justice Joseph Story to Theodore Sedgwick, November 7, 1844 (reprinted in THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 1-2 (1st ed. 1847)).

treatise." HORWITZ, *supra* note 11, at 83. This Court adopted its analysis of the exemplary damages doctrine, calling it an "excellent treatise." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

Sedgwick's analysis of the exemplary damages doctrine is straightforward and familiar. Generally, damages provide compensation "for the actual loss sustained." THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 28 (1st ed. 1847). However, for torts "accompanied by oppression, fraud, malice, or negligence so gross as to raise a presumption of malice, . . . the jury have a discretion to award exemplary or vindictive damages . . . ." *Id.* at 27-28; *see also id.* at 34 (referencing the "large class of cases where the common law in giving relief loses sight of the principle of compensation, and gives damages by way of punishment for acts of malice, vexation, fraud or oppression").

Sedgwick emphasized that a case involving exemplary damages is conceptually distinct from a case involving merely compensatory damages, as it involves the imposition of punishment to protect society. Where there is a "question of fraud, malice, gross negligence, or oppression" involved,

> the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender.

Id. at 38-39. Sedgwick provided an analysis of thirteen representative decisions, dating back to 1763, including those of Chancellor Kent and Justice Story. *Id.* at 39-44.

Four years after Sedgwick published his treatise, this Court reached the same conclusion as Sedgwick concerning the status of the exemplary damages doctrine, stating that it was "a well-established principle of the common law" that in tort cases "a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in

mind the enormity of his offence rather than the measure of compensation to the plaintiff." *Day v. Woodworth*, 54 U.S. 363, 371 (1851). On the basis that "repeated judicial decisions for more than a century are to be received as the best exposition of what the law is," this Court concluded that "the question will not admit of argument." *Id.* ATRA asserts that in *Day*, "this Court all but apologized for the availability of exemplary damages in civil cases . . . ." ATRA Br. at 3 (citing *id.*). We see no basis for that assertion.

Seven years later, this Court reiterated that "punitive or exemplary damages" may be recovered in tort cases "[w]henever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity," and that in such cases "the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person." *Philadelphia, Wilmington, and Baltimore R.R. Co. v. Quigley*, 62 U.S. 202, 213-14 (1858).

Seventeen years later, this Court reiterated that the exemplary damages doctrine "is too well settled now to be shaken"; that the doctrine is based "on the ground, not that the sufferer is to be recompensed, but that the offender is to be punished"; that juries are thereby "authorized, for the sake of public example, to give such additional damages as the circumstances require"; and that the doctrine "has been accepted as the general rule in England and in most of the States of this country." *Milwaukee and St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 492-93 (1875).

Ten years later this Court, in an opinion by Justice Field, reaffirmed the above decisions; explicitly approved Sedgwick's analysis of how the exemplary damages remedy protects the interests of society; and stated that "the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

The next year, in *Barry v. Edmunds*, 116 U.S. 550 (1886), this Court stated that under "settled law," a tort plaintiff may seek "exemplary damages calculated to vindicate his right and protect it against future similar

invasions." *Id.* at 562. After discussing its earlier decisions and selected lower court decisions, *id.* at 562-65, this Court noted that it was unnecessary "further to multiply authorities on this point," for the precedents validating the remedy of exemplary damages "are indefinite in number, and the application of the rule as uniform as the circumstances of the cases are various." *Id.* at 565.

Three years later, in another opinion by Justice Field, this Court noted that the "propriety and legality" of exemplary damages had been recognized "by repeated judicial decisions for more than a century," so that their imposition "cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law." *Minneapolis and St. Louis Railway Co. v. Beckwith*, 129 U.S. 26, 36 (1889).

Four years later, this Court again noted the "well settled" nature of the exemplary damages remedy. *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893). In a historical analysis, Justice Gray cited Lord Camden's 1763 decisions in the lawsuits involving Wilkes and *North Briton*, No. 45, stating: "The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized." *Id.*

Mentioning in its brief *none* of these seven decisions of this Court decided between 1851 and 1893 — all confirming the consensus status of the exemplary damages doctrine — Philip Morris asserts: "Throughout the second half of the 19th century, courts and commentators were sharply divided over whether damages could ever properly be imposed for purposes of punishment." Pet. Br. at 18. This assertion rests on a citation to the 16th and final edition of Professor Simon Greenleaf's evidence treatise, published in 1899.[17]

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[17] 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253, at 240-50 (William Draper Lewis ed., 16th ed. 899). Philip Morris's other two citations provide no support for its assertion. One is a citation to Sedgwick's treatise, supplied only to illustrate the contrary view. The second is a citation to a concurring opinion by Justice Scalia. That

The 1899 edition of Professor Greenleaf's treatise actually contradicts Philip Morris's assertion that a "sharp" division over the exemplary damages doctrine existed in 1899. Philip Morris relies on an 11-page footnote containing Greenleaf's radical assertion that awards of extra-compensatory damages simply had no precedential support. The footnote is appended to Greenleaf's statement that damages are solely "given as a compensation . . . for an injury actually received by [plaintiff] from the defendant," and thus damages "should be precisely commensurate with the injury, neither more nor less; and this whether it be to his person or estate." Greenleaf, *supra* note 17, at 240.

The only portion of this footnote actually arguing in support of the statement in text is not any material describing the law as it stood in the late 1800s, but material which was written by Greenleaf *more than 45 years before* the 16th edition was published in 1899. The first 581 of the 645 lines relied on by Philip Morris (90%) are identical to the fifth edition published in 1854 shortly after Greenleaf's death.[18] The remaining 10% of the material in the 1899 edition, added by editors after 1854 in several installments, contains no argument in support of Greenleaf's position circa

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opinion actually undermines Philip Morris's assertion. Justice Scalia did not suggest there was a relevant division among commentators over the existence of exemplary or punitive damages throughout the 19th century, that is, through 1899. Instead, he merely noted that "[a]s recently as the mid-19th century, treatise writers sparred over whether they even existed." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 25 (1991) (Scalia, J., concurring in the judgment). Further, rebutting the notion that the position argued in Greenleaf's treatise had solid support, and thus was part of a "sharp" division, Justice Scalia stated that Greenleaf's view "was not widely shared." *Id.* Finally, Justice Scalia's ultimate conclusion based on the historical record (which Philip Morris ignores) is one we share: by 1868, "punitive damages were undoubtedly an established part of the American common law of torts." *Id.* at 26.

[18] *Compare* 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253, at 250-66 n.2 (5th ed. 1854), *with* 2 GREENLEAF, *supra* note 17, at 240-49 n.2. (Copies of these and other Greenleaf treatise sections, and of various other materials referenced in this brief, are being posted online in PDF format at http://blogs.law.harvard.edu/onfile/williams.)

1899; instead, these additions undermine that position. Of the 27 post-1854 cases which are cited, virtually all are contrary to Greenleaf's position. Further, two comments added by the editors first undercut (in 1883) and then abandon (in 1899) Greenleaf's entire argument. They describe the "large class of cases" which had been decided contrary to "the elaborate argument of Mr. Greenleaf," and the "settled" nature of the exemplary damages doctrine.[19] Even during his lifetime Greenleaf did not defend his argument after Sedgwick attacked it in his second edition.[20]

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[19] A passage added in 1883 by the editor of the 14th edition (pages 263-64) highlights the deterrence function of the exemplary damages doctrine as it was being applied to railroads. It cites nine cases in support of this statement: "There is a large class of cases, *i.e.* actions against railroad companies for injuries inflicted by them, in which the language of courts at least seems to uphold the view of Mr. Sedgwick. The underlying principle is, perhaps, that the only way to secure safety for passengers is to mulct the companies so heavily when accidents occur, that it will be for their interest to use all possible precautions to avoid such accidents, and in this roundabout way to produce a public benefit." 2 GREENLEAF, *supra* note 17, at 249 n.2.

The 15th edition, published in 1892, included no additions or edits to this footnote. Both the 14th and 15th editions were edited by Greenleaf's grandson. Not until the 16th edition published in 1899 (the edition relied on by Philip Morris) — a project carried out by Professor (later Dean) Wigmore and another law professor — was a statement finally added recognizing that "the elaborate argument of Mr. Greenleaf" made in his 1854 edition had been soundly rejected by the courts in the subsequent 45 years. 2 GREENLEAF, *supra* note 17, at 250 n.2.

[20] The first edition of Sedgwick's damages treatise was published in 1847. It "demonstrated overwhelmingly the long-standing authority behind punitive damages." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY, at 113 (1992). It was at this juncture that Greenleaf attacked Sedgwick's position; the lengthy footnote first appeared in the second edition of Greenleaf's evidence treatise (pages 242-57) which was published in 1848.

In 1852, Sedgwick responded in his second edition, including a detailed refutation of Greenleaf's argument in which he described Greenleaf's views as "untenable" and contrary to "the uniform language of the courts." THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 466-67 n.¶ (2d ed. 1852). Greenleaf's fourth edition was published in 1852 *before* Sedgwick's second edition, so Greenleaf's chance

Thus, contrary to Philip Morris's brief, this Court was plainly correct, when it surveyed the historical record 15 years ago, in concluding that the exemplary damages doctrine was "well established before the Fourteenth Amendment was enacted" in 1868. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991); *see also id.* at 25-26 (Scalia, J., concurring in the judgment). Indeed, our review of the historical record has not uncovered *any* state which prior to 1868 repudiated the common-law doctrine and imposed a total bar on the recovery of exemplary damages; instead, there was a common-law consensus in 1868. Only after 1868, influenced by the beginnings of late-19th-century legal formalism, did some courts begin to believe that the imposition of exemplary damages was "a usurpation of the public law functions of the criminal law," leading several courts to impose a total bar on exemplary damages.[21]

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to respond to Sedgwick was in his fifth edition, the last one he edited, which was published in 1854, and in which Greenleaf updated his lengthy footnote, adding 35 new lines summarizing two recent decisions (at pages 262 and 265). But Greenleaf neither defended himself against Sedgwick's attack on his analysis, nor edited the analysis in his footnote to remedy the flaws identified by Sedgwick. He simply ignored Sedgwick's attack.

[21] Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982). It was "[d]uring the late 1870s and 1880s" that opposition to exemplary damages became powerful enough that "the theoretical issue of the true nature of public versus private law overshadowed the question of precedent," and several courts "overthrew the doctrine of punitive damages . . . through a process of deduction from the supposedly different inherent functions of public and private law." HORWITZ, *supra* note 20, at 113-14. As examples, Horwitz cites *Fay v. Parker*, 53 N.H. 342, 382 (1873), and *Murphy v. Hobbs*, 7 Colo. 541, 551 (1884). *Id.* at 114, 296. Other examples of an absolute bar on exemplary damages influenced by the public/private construct would appear to include *Boyer v. Barr*, 8 Neb. 68, 72 (1878) (adopting *Fay*); *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45 (1891) (adopting *Fay* and *Murphy*); *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 245 (1891) (Holmes, J.).

ATRA Br. at 8-9 n.5, asserts an 1868 Michigan decision banned all exemplary damages, but in fact the decision merely shielded publishers sued for libel if they had acted in good faith. *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447, 453-54 (1868). Philip Morris notes that Michigan was allowing exemplary damages in 1874. Pet. Br. at 19.

History does not support the efforts of Philip Morris and ATRA to obscure the deterrence-based origins of the exemplary damages doctrine by asserting that historically "punitive damages were awarded only as punishment for harm to the specific person bringing the claim," Pet. Br. at 17, and that "punitive damages were never understood as a mechanism for vindicating affronts to society generally," ATRA Br. at 12. To the contrary, from their very beginnings in the 1763 cases involving John Wilkes and presided over by Lord Camden, both in England and in America exemplary damages have been awarded in large part as a means of advancing society's interest in deterring intentional wrongs.

II. History Supports the States' Deference to Juries in Determining the Amount of Deterrence-Based Exemplary Damages

Philip Morris and ATRA make a related argument concerning the history of exemplary damages which appears equally without merit. The issue is what degree of deference courts, particularly appellate courts, historically have accorded juries in their determination of what amount of exemplary damages is needed in a given case.

Both Philip Morris and ATRA appear to suggest that there is no tradition of judges giving any particular deference to the exemplary damages awarded by a jury in a given case, so that *de novo* review, or at least some sort of weight-of-the-evidence review, is permissible for this Court to undertake. We do not know what else to make of their statements, for example, that historical practice supposedly does not shield jury-awarded exemplary damages "from exacting constitutional scrutiny," ATRA Br. at 30, and that "long-established practice" supposedly requires that "when compensatory damages are substantial, the constitutional maximum punishment is between zero and four times the amount of compensatory damages." Pet. Br. at 9. Certainly there is no mention in either brief of any sort of deference owed juries in exemplary damages cases.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). *See also Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 40 (1991) (Kennedy, J., concurring in the judgment) ("Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair."). The traditional practice regarding judicial review of exemplary damages verdicts, particularly verdicts based on the deterrence rationale found in the earliest cases, is one of deference to the jury's weighing of the facts of the case and the jury's judgment regarding what size award is appropriate. The view that judges (particularly appellate judges) can or should engage in *de novo* or weight-of-the-evidence review of damages awards, including exemplary damages awards, is inconsistent with the historical record.

For example, in rejecting a challenge to the exemplary damages awarded in one of the cases involving John Wilkes and *North Briton*, No. 45 (see pp. 5-8, *supra*), Lord Camden stated that "it is very dangerous for the Judges to intermeddle in damages for tort; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages." *Huckle v. Money*, 95 Eng. Rep. 768, 769 (C.P. 1763). Later English cases generally deferred to "the jury's determination of damages" (though they reserved the power "to order new trials solely on the basis that the damages were too high," and sometimes did order them).[22] Such deference to jury verdicts

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[22] *Oberg*, 512 U.S. at 422-23. *See also* Brief for Legal Historians Daniel R. Coquillette, Mark M. Hager, Bruce H. Mann, and Arthur F. McEvoy as *Amici Curiae* in Support of Respondent in *Honda Motor Co. v. Oberg*, No. 93-644 (filed Mar. 31, 1994), at 4-8 ("*Oberg* Historians' *Amicus* Br.") (cited in this Court's *Oberg* decision, *id.* at 422 n.2).

on damages was, Theodore Sedgwick noted, a corollary of the welcome movement in the law away from the earlier blunderbuss approach of having damages arbitrarily fixed under preset schedules, or according to arbitrary ratios.[23]

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[23] Sedgwick observed that it was "the laws of remote and barbarous periods" which took "the most minute care" in fixing damages recoveries (for example, sixth-century England used a damages schedule under which six shillings were due for a front tooth knocked out; 10 shillings for a great toe cut off; 12 shillings for an ear cut off, etc.). THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 13 (3rd ed. 1858). Schedules of specific damages "arbitrarily assessed in each class of cases, without reference to the actual injury sustained in the particular case" are found in "still more ancient" codes, for example double damages for certain offenses under Jewish law. *Id.* at 21. With the advance of civilization, the law outgrew such arbitrary damages rules, as tribunals were formed which could "be trusted with the assessment of the amount" of damages, *id.* at 16 — in England, the jury. *Id.* at 19. Sedgwick believed that such arbitrary rules were "always a misfortune and a defect in jurisprudence; they should never be tolerated, unless on account of some peculiar and extraordinary difficulty in arriving at the truth of the individual case." *Id.* at 16.

Modern scholarship confirms Sedgwick's insights and further illustrates that arbitrary "ratio" rules such as Philip Morris's proposed "multiple-of-0-to-4 rule," Pet. Br. at 9, draw on the historical record of remote periods. Primitive and early societies typically had "no officials to take action against murder, theft, and other coercive acts," so deterrence of intentional wrongs was accomplished though "the possibility of retaliation by victim against aggressor," usually with help from the victim's family or broader group. Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 76-77 (1980). In such societies, the principle of "the *lex talionis* of early Roman law," and "the 'eye for an eye' precept in the Old Testament . . . and in many other early codes" developed "as a substitute for or limitation on vengeance." Without such a limitation, "people might react to a wrong by retaliating against the wrongdoer *disproportionally* and, especially when this was so, the original wrongdoer or his family might in turn retaliate against the original retaliator or his family," in "an endless cycle of injury, retaliation, and counter-retaliation . . . ." *Id.* at 71, 82. The principle of *lex talionis* preserved social order by supplanting "the ancient practices of indiscriminate personal revenge" in which "partisan bias" risked triggering "spirals of escalating violence." Francesco Parisi, *The Genesis of Liability in Ancient Law*, 3 AM. L. & ECON. REV. 82, 86-87 (2001). *See also* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1282-84 (2001). Of course, with the rise of the modern administrative state, which couples a monopoly on legitimate violence

Historically, American courts followed the English practice of providing some judicial review of jurors' damages verdicts while generally according heavy deference to the discretion of the jury. Typically judges only disturbed verdicts so extravagant and inexplicable on the record of the case as to make clear that the jurors' verdict must have been the product of "passion and prejudice," and not the product of a fair trial involving reasoned decisionmaking based on the evidence. *Oberg*, 512 U.S. at 424-26; *see also Oberg* Historians' *Amicus* Br., *supra* note 22, at 12-19.

Consistent with this history, various justices of this Court have stated that in an exemplary damages case where there are no indications that the trial was unfair or that the jury engaged in improper reasoning, there attaches to a jury verdict a presumption (possibly irrebuttable, or virtually so) that the product of that fair process comports with due process. *E.g.*, *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993) (plurality opinion) (citing earlier opinions by Justices Scalia and Kennedy); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 586-88 (1996) (Breyer, J., joined by O'Connor and Souter, JJ., concurring). So far, this Court has not disturbed any jury verdict to which that presumption attached. In both cases in which this Court has found problematic the size of an exemplary damages award, the presumption did not attach because of serious

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with elaborate procedural protections, *id.* at 1284, the predicate for insisting on a principle of proportional retaliation long ago vanished. Still, given the period during which the observance of proportional limits on retaliation was important to social order, "it would not be surprising that everyone, . . . would be inclined to find the retributive conception of fair punishment intuitively appealing." *Id.* at 1287. But today "it would make no sense" to apply this conception developed in primitive times to limit the penalties otherwise found appropriate to increase the well-being of all members of modern society. *Id.* at 1288. An understanding of economic principles coupled with an understanding of "the origins and functions of retribution as a social norm makes clear that there is no good reason for treating our intuitions about retribution as if they constituted an independent basis for" limiting the punishment found to be appropriate to improve the welfare of members of society. *Id.* at 1290.

defects this Court saw in the underlying trials.[24]

Confirmation that appellate judges historically have not engaged in *de novo* or weight-of-the-evidence review of exemplary damages awards is found in the arguments made by prominent members of this Court's bar in *Oberg*, in addressing what level of judicial review is required by due process. They did not suggest the existence of any tradition of *de novo* or weight-of-the-evidence review which should inform the content of due process.

Most notably, the lead counsel for the petitioner in *Oberg*, who is also lead counsel for Philip Morris in this case, was pressed by Justice O'Connor at the *Oberg* oral argument about the nature of the judicial review being sought as a matter of due process. Justice O'Connor asked "why should the constitutionally mandated review be any more than is required in a criminal case" under the standard of *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979)? He conceded that judicial review under *Jackson*'s "rational factfinder" test would be constitutionally adequate judicial review, stating: "I have no problem with that standard. That's what we would like to see the Court supply." Transcript of Oral Argument in *Honda Motor Co. v. Oberg*, No. 93-644 (Apr. 20, 1994), 1994 WL 665077, at *15-*17.

A similar position was advanced by the late Dean Griswold in an *amicus* brief filed on behalf of the petitioner

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[24] In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), there was no hint of any presumption in operation; indeed, this Court affirmatively indicated that its concerns were "heightened" because the jury had awarded $145 million in exemplary damages after being presented "with evidence that has little bearing as to the amount of punitive damages that should be awarded," evidence that was "tangential or only inflammatory." *Id.* at 418; *see also id.* at 420-24 (summarizing concerns about fairness of trial). In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), no presumption could attach because it was conceded that "the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages" of $4,000 (the loss of value due to the repainting of his vehicle) "by the number of similar sales in other jurisdictions" (approximately 1,000), *id.* at 564, 567, even though "neither the jury nor the trial court was presented with evidence that any of BMW's out-of-state conduct was unlawful." *Id.* at 573.

in *Oberg*. He suggested that "courts should be required to consider whether a particular award is rationally related to the goals of deterrence and punishment . . . ." Brief *Amici Curiae* for the American Council of Life Insurance, et al., in No. 93-644 (filed Feb. 28, 1994), at 13-14. Further, Dean Griswold urged that "to ensure that courts consult something other than their own preconceptions in evaluating the rationality of such awards, courts should be required to consider certain objectively measurable indicia of what amounts are reasonably necessary to serve the goals of deterrence and punishment," in the form of "a non-exclusive list of factors" for courts to consider in analyzing the rationality of an award. *Id.* at 14. This Court took that course two years later in *BMW v. Gore*.

In its *Oberg* decision, this Court held only "that Oregon's denial of judicial review" of exemplary damages awards violated due process, and did not decide "what standard of review is constitutionally required." *Oberg*, 512 U.S. at 432 & n.10. However, this Court suggested that the traditional approach of review for "passion and prejudice" might be a rough equivalent of the *Jackson* standard, which asks whether a "rational trier of fact could have" reached the jury's verdict. *Id.* at 432 n.10. "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," thus "imping[ing] upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson*, 443 U.S. at 319.[25]

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[25] By definition, review under the *Jackson* "rational factfinder" test is conceptually distinct from both *de novo* review and weight-of-the-evidence review. *See* Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1126-27 (1987). The function of the *Jackson* test in a criminal case is to set, as a matter of due process, "a lower limit on an appellate court's definition of evidentiary sufficiency," which means no weight-of-the-evidence analysis is permitted; rather, "the reviewing court must view 'the evidence in the light most favorable to the prosecution.'" *Tibbs v. Florida*, 457 U.S. 31, 45 & n.21 (1982) (quoting *Jackson*, 443 U.S. at 319).

Jackson involved the review of evidentiary sufficiency to sustain a criminal conviction, but a close variant of the *Jackson* standard has traditionally applied to judicial review of jury determinations in civil litigation as well.[26] Judicial review of a jury's verdict under *Jackson's* "rational factfinder" standard is obviously the most that any civil litigant could claim a right to as a matter of due process. Thus, if a defendant attacking an exemplary damages award following a procedurally fair trial fails to show that no rational jury could reach that result, due process should provide no basis for displacing the jury's verdict.

Even if *de novo* or weight-of-the-evidence were somehow permitted or even required by due process, there would remain the Seventh Amendment problem with this Court or any other federal appellate court conducting such review. As *amici* have discussed at length in an earlier *amicus* brief, a key function of the Re-Examination Clause of the Seventh

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See also Herrera v. Collins, 506 U.S. 390, 402 (1993) (*Jackson* "does not focus on whether the trier of fact made the *correct*" decision, "but rather whether it made a *rational* decision"); *Burks v. United States*, 437 U.S. 1, 16 (1978) ("Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal").

[26] As to liability determinations, this Court has required use of the *Jackson* "rational factfinder" standard both in the summary judgment context, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986), and on motions for judgment as a matter of law. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149-51 (2000). The standard has long been used by the lower federal appellate courts in reviewing attacks on the size of a jury's compensatory damage award. *E.g., Glazer v. Glazer*, 374 F.2d 390, 413 (5th Cir.) (Wisdom, J.), *cert. denied*, 389 U.S. 831 (1967) (striking down $1.9 million compensatory award for breach of contract because "[t]he verdict was excessive as a matter of law in that it exceeds any rational appraisal or estimate of the damages that could be based upon the evidence before the jury"). *See also Naeem v. McKesson Drug Co.*, 444 F.3d 593, 611 (7th Cir. 2006); *Sailor Inc. F/V v. City of Rockland*, 428 F.3d 348, 353-55 (1st Cir. 2005) (Boudin, J.); *Asa-Brandt, Inc. v. ADM Investor Services, Inc.*, 344 F.3d 738, 745 (8th Cir. 2003); *Kasper v. St. Mary of Nazareth Hosp.*, 135 F.3d 1170, 1176-77 (7th Cir. 1998) (Posner, C.J.); *Outboard Marine Corp. v. Babcock Indus., Inc.*, 106 F.3d 182, 186-87 (7th Cir. 1997) (Posner, C.J.).

Amendment is to bar federal appellate courts, including this Court, from engaging in any sort of *de novo* or weight-of-the-evidence review of jury verdicts, including damages awards. Brief of Federal Jurisdiction and Legal History Scholars Akhil Reed Amar, et al., as *Amici Curiae* in Support of Petitioner in *Gasperini v. The Center for Humanities*, No. 95-710 (filed Mar. 1, 1996), at 4-21.

In exemplary damages cases based on deterrence, a jury must "look to the future conduct of the defendant and others; the question is: how large a judgment is needed to discourage this sort of conduct in the future?" Morris, *supra* note 9, 44 HARV. L. REV. at 1179. As far back as 1763, in *Huckle v. Money*, 95 Eng. Rep. 768, 768 (C.P. 1763), Lord Camden emphasized that juries awarding exemplary damages in tort cases must consider "a vast variety of causes, facts, and circumstances . . . ." *Huckle* was one of the cases this Court cited in upholding a Seventh Amendment right to a jury trial on statutory damages in a copyright case. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998). It would be extraordinary if *Huckle* were good precedent for the right to a jury trial in a copyright case but *not* good precedent for the right to a jury trial in a case like *Huckle* seeking deterrence-based exemplary damages.

It was in large part to ensure that cases involving exemplary damages and other important matters would be decided by juries, not by judges who might be beholden to elites, that the Seventh Amendment was made part of our Constitution. See note 13, *supra*. Even if it is possible to characterize *some* exemplary damages awards as involving the expression of abstract moral condemnation and not the decision of questions of historical or predictive fact, *see Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437-39 (2001), such a theory could not support wholesale nullification of the Seventh Amendment in the field of exemplary damages, particularly as to awards specifically focused on a deterrence rationale. Because the Seventh Amendment is one of the few structural constraints imposed by the Constitution on this Court's own power, it deserves close attention wherever potentially relevant.

Respectfully submitted.

ARTHUR MCEVOY
975 Bascom Mall
Madison, WI 53706
(608) 265-4771

KENNETH CHESEBRO*
1770 Massachusetts Ave., # 201
Cambridge, MA 02138
(617) 661-4423

MICHAEL J. PIUZE
LAW OFFICES OF MICHAEL J. PIUZE
11755 Wilshire Blvd., Suite 1170
Los Angeles, CA 90025
(310) 312-1102

Counsel for Amici Curiae

* Counsel of Record

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In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SHERMAN JOYCE
American Tort Reform Association
1850 M Street, N.W.
Suite 1095
Washington, D.C. 20036
(202) 682-1163

ROY T. ENGLERT, JR.*
ALAN E. UNTEREINER
DANIEL R. WALFISH
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

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BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA has filed a number of *amicus curiae* briefs in cases before this Court concerning important issues of liability, including the constitutional restrictions on punitive damages awards. ATRA's members have a substantial interest in the development of sound legal principles governing the power of juries to mete out punishment in civil litigation.

SUMMARY OF ARGUMENT

For most of this Nation's history, the imposition of punishment without the protections of criminal law has been regarded as constitutionally suspect. And yet broad-based constitutional attacks on the practice of awarding punitive damages in civil cases have always failed, because the remedy has a clear historical pedigree. Given that that pedigree is the only thing that has saved punitive damages, courts must look past the mere label to determine whether a *particular approach* to punitive damages has historical antecedents that exempt it

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[1] All parties have consented to the filing of this brief. The parties' blanket consents have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

from the usual prohibitions on the use of civil procedures to inflict criminal punishments and on the arbitrary deprivation of property.

There is no historical support for punishing a defendant for the effect of its conduct on parties not before the court. From its origins in two English decisions in 1763, through the adoption of the Bill of Rights in 1791, up to and beyond the ratification of the Fourteenth Amendment in 1868, the practice of awarding punitive damages was always understood as a way to vindicate the particular plaintiff before the court, not to punish the defendant for harm done to non-parties.

Cases in which the defendant's action caused harm to multiple persons confirm this understanding. A survey of every reasonably accessible pre-1870 American case brought against a corporation, and dealing with the subject of punitive damages, reveals *not one case* in which a court approved a punitive award that reflected harm to parties not before the court. The authorities that have been cited to this Court in past cases for the proposition that such awards were allowed actually stand for no such thing.

Likewise, there is no historical basis for upholding punitive awards that are many multiples of the compensatory award when the compensatory award itself is substantial. In pre-1870 cases of substantial compensatory awards, punitive awards upheld on appeal were almost never more than one or two times the amount of compensatory damages. And, again, claims made to this Court in recent cases about the historical precedents for high ratios fall apart on examination. Virtually all of the cases that have been cited to this Court either (1) did not involve punitive damages at all, as opposed to compensatory damages for non-economic injury, or (2) concerned situations in which actual damages were insignificant; or (3) were soon disavowed by the same court that approved the award.

ARGUMENT

During oral argument in *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (Oct. 3, 1990), Justice Scalia noted that the practice of awarding punitive damages has "been going on since 1791, as I understand it," and asked how the practice could be "in violation of due process when it's been going on since 1791 and nobody has thought [the practice violated due process]?"[2] As we demonstrate in this brief, although the punitive damages remedy had recently begun to take shape in 1791, nothing remotely like what the court below approved in this case was going on in 1791, between 1791 and the adoption of the Fourteenth Amendment, or indeed at any time until the late 20th century.

Almost from the Founding, punitive damage awards have been regarded as constitutionally suspect because, among other difficulties, they inflict punishment without the safeguards of the criminal law. See, *e.g.*, *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). In 1851, this Court all but apologized for the availability of exemplary damages in civil cases: "We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). After the ratification of the Fourteenth Amendment, the Court rested its conclusion that punitive awards do not offend the Due Process Clause purely on tradition. *Minneapolis & St. L. Ry.* v. *Beckwith*, 129 U.S. 26, 36 (1889) (citing *Day*).

More recently, this Court has continued to invoke deference to history as the principal constitutional justification for the entire practice of awarding punitive damages. See *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15-18 (1991); see also

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[2] 1990 WL 601340, at *21-22.

id. at 40-41 (Kennedy, J., concurring in the judgment); *id.* at 37 (Scalia, J., concurring in the judgment) (observing that "nothing but the conclusiveness of history can explain * * * today's decision" approving punitive damage procedures and that "it would surely not be considered 'fair' (or in accordance with due process) to follow a similar procedure outside of this historically approved context").

This emphasis on historical practice is appropriate. As this Court has recognized, "history and widely shared practice" are "concrete indicators of what fundamental fairness and rationality require." *Schad* v. *Arizona*, 501 U.S. 624, 640 (1991). It is true that exemplary awards were a well-recognized feature of the legal landscape by 1868, which this Court has characterized as the "crucial time" for purposes of a Due Process Clause challenge. *Burnham* v. *Superior Court of California*, 495 U.S. 604, 611 (1990); see also *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 n.12 (1994) (looking to 19th-century practice to support holding that a regime governing review of punitive damage awards was unconstitutional); *Pac. Mut. Life Ins. Co.*, 499 U.S. at 25-26 (Scalia, J., concurring in the judgment) (reviewing 19th-century authorities and concluding that "[i]n 1868, therefore, when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts").

What was not familiar in 1868 (for, for that matter, any time before then going back to 1791)—indeed, was entirely unheard of—was the procedure and resulting massive punitive exaction approved by the Supreme Court of Oregon in this case. Our country's legal traditions furnish not the slightest support for awarding to one lucky plaintiff a gigantic penalty designed to punish the defendant for all of the harm it was believed to have caused to thousands of others who were not and never would be party to the lawsuit. Neither does historical practice in American courts sanction the imposition of a

punitive damages award many times greater than an award of substantial compensatory damages.

"The fact that the historical institution of punitive damages has been around for centuries immunizes it from constitutional review, but it does not, of course, mean that any remedy a modern court chooses to call 'punitive damages' is automatically constitutional. If the courts completely change the fundamental nature of the institution of punitive damages, slapping the old label on them will not avoid all questions of constitutional infirmity." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages As Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 647 (2003); see also John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140 (1986) ("[P]unitive damages at least have the warrant of past practice, and that in itself suggests constitutional permissibility. In fact, however, the application of traditional punitive damages doctrine to modern mass tort litigation has produced a situation altogether different from past experience.").

Tradition has always been the primary constitutional justification for punitive damages, and yet the award in this case flies in the face of American legal traditions in several respects. For that reason, the decision of the Oregon Supreme Court should be reversed.

I. Historical Practice Provides No Support For Punishing A Defendant For The Effects Of Its Conduct On Parties Not Before The Court

A. Punitive Damages Historically Were Understood As Vindication For The Particular Plaintiff Before The Court

1. The common law remedy of punitive damages (also known as "exemplary damages," "vindictive damages," and "smart money") originated in a pair of English lawsuits decided in 1763. See, *e.g.*, 1 JOHN J. KIRCHER & CHRISTINE M.

WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE 1-2 (2d ed. 2000); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262-1263 (1976). Both cases arose out of the issuance by the King's agent of an unlawful general warrant to arrest the printers and publishers of a newspaper that had offended and allegedly libeled the King. Acting on the warrant, the King's officers broke into the house of the publisher, John Wilkes, and rummaged through and seized his papers. Wilkes sued in trespass. The judge instructed the jurors that they "have it in their power to give damages for more than the injury received," and the jury awarded £1000. *Wilkes* v. *Wood*, Lofft 1, 18-19, 98 Eng. Rep. 489, 498 (K.B. 1763).

The officers also detained a printer's assistant, who sued for trespass and false imprisonment. Even though the assistant's actual injuries, according to the court, were small and likely not worth more than £20—the custody lasted only six hours, and the officers "used [the plaintiff] very civilly by treating him with beef-steaks and beer"—he recovered an award of £300. *Huckle* v. *Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763).[3]

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[3] *Wilkes* and *Huckle* continue to animate the law of punitive damages in England. Thus, unless authorized by a statute, exemplary damages are available in England only when either: (1) there is "oppressive, arbitrary, or unconstitutional action by the servants of the government," or (2) "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff." *Rookes* v. *Barnard*, [1964] A.C. 1129, 1226 (H.L. 1964); see also 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES 11-14 (5th ed. 2005) (reviewing status of punitive damages in England since *Rookes*).

The remedy soon spread across the Atlantic to the American colonies and States,[4] where, from the time of the ratification of the Constitution and after, it was generally used to achieve vindication in cases of torts like assault, libel and slander, malicious prosecution, false imprisonment, seduction, and intentional interferences with property such as trespass and conversion. Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1007-1008 (1999); *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 838 (2d Cir. 1967) (citing PROSSER, TORTS § 2, at 10-11 (1964)). As Judge Friendly remarked after reviewing this list: "What strikes one is not merely that these torts are intentional but that usually there is but a single victim; a punitive recovery by him ends the matter, except for such additional liability as may be provided by the criminal law." *Roginsky*, 378 F.2d at 838.

Indeed, the tort law itself historically redressed one plaintiff's injuries at a time. As Chief Justice Marshall had occasion to observe: "The province of the court is, solely, to decide on the rights of individuals * * *." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Under the traditional understanding, while a single act committed by a defendant "may violate any number of rights, * * * each such violation would constitute a different wrong," and each "would give rise to different causes of action." *City of Columbus* v. *Anglin*, 48 S.E. 318, 320 (Ga. 1904). Thus, "many causes of action may grow out of a single act or tort, to as many individuals as suffer damages by the wrongful act." *Ill. Cent. R.R.* v. *Slater*, 39 Ill. App. 69, 81

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[4] The earliest reported American case with an exemplary award is believed to be a lawsuit in South Carolina in which the plaintiff was a foreigner tricked by a doctor into drinking poison one evening. The court instructed the jury "that this was a very wanton outrage upon a stranger in the country," and that the plaintiff suffered "a very serious injury," which "entitled him to very exemplary damages." *Genay* v. *Norris*, 1 S.C.L. (1 Bay) 6, 7 (1784).

(1890). As recently as the turn of the last century, multiple plaintiffs were not allowed to join the same suit in actions at law unless they could prove that they were jointly interested in the subject of the injury. See, *e.g.*, SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 227 (William Draper Lewis ed., 1899); *Cleaveland* v. *Grand Trunk Ry. Co. of Canada*, 42 Vt. 449, 458 (1869).

2. Punitive damages, and the reasons for them, have always been a subject of dispute.[5] Courts sometimes spoke of

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[5] One of the most famous disagreements in 19th-century law was that between Harvard professor Simon Greenleaf, who believed damages for any purpose other than compensation did not and should not exist, *e.g.*, Greenleaf, *The Rule of Damages in Actions Ex Delicto*, 5 W.L.J. 289, 289-290, 296 (1848), and treatise author Theodore Sedgwick, who believed that the law of punitive damages "blends together the interest of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender," Sedgwick, *The Rule of Damages in Actions Ex Delicto*, 5 W.L.J. 193, 194 (1848) (emphasis and internal quotation marks omitted). Greenleaf's position had its most forceful exposition in the extraordinarily thorough opinion in *Fay* v. *Parker*, 53 N.H. 342 (1874), which was sprinkled with classical references and consumed with bile. *Fay* renounced non-compensatory damages as a matter of New Hampshire law, which to this day does not recognize them. *E.g.*, *Crowley* v. *Global Realty, Inc.*, 474 A.2d 1056, 1058 (N.H. 1984).

New Hampshire is not alone. Punitive, or non-compensatory, damages are and long have been unavailable under the law of a number of other States, including Michigan and Nebraska, and, unless authorized by statute, Massachusetts and Washington. See, *e.g.*, *Peisner* v. *Detroit Free Press*, 364 N.W.2d 600, 606 (Mich. 1984); *Detroit Daily Post Co.* v. *McArthur*, 16 Mich. 447, 453 (1868); *Distinctive Printing and Packaging Co.* v. *Cox*, 443 N.W.2d 566, 574 (Neb. 1989); *Riewe* v. *McCormick*, 9 N.W. 88, 89 (Neb. 1881); *Flesner* v. *Technical Commc'ns Corp.*, 575 N.E.2d 1007, 1112 (Mass. 1991); *Burt* v. *Advertiser Newspaper Co.*, 28 N.E. 1, 5 (Mass. 1891) (Holmes, J.) ("Vindictive or punitive damages are never

punitive damages as serving the goals of retribution and deterrence,[6] which today are the only recognized reasons for exemplary awards, see, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416 (2003). "Just as frequently, however, the courts justified punitive damages as additional compensation for mental suffering, wounded dignity, and injured feelings—harms that were otherwise not legally compensable at common law." Colby, *supra*, 87 MINN. L. REV. at 615; accord 1 SCHLUETER, *supra* note 3, at 8. A particularly clear illustration of this point is *Morse* v. *Auburn & Syracuse R.R.*, 10 Barb. 621 (N.Y. Sup. Ct. 1851), which distinguished between injury remedied by ordinary damages and that remedied by "[e]xemplary or punitory damages, or smart money," and noted that the latter are a punishment in which "the mental suffering, the injured feelings, the sense of injustice, of wrong, or insult on the part of the sufferer, enter largely into the account."

"Until well into the 19th century," this Court has noted, "punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001) (citing Note, *Exemplary Damages in the Law of Torts*, 70

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allowed in this state."); *Dailey* v. *N. Coast Life Ins. Co.*, 919 P.2d 589, 590-591 (Wash. 1996); *Spokane Truck & Dray Co.* v. *Hoefer*, 25 P. 1072, 1075 (Wash. 1891).

[6] See, *e.g.*, *Coryell* v. *Colbaugh*, 1 N.J.L. 77 (N.J. 1791) (jurors told they were "to give damages for *example*'s sake, to prevent such offences in future," and that they "might give such a sum as would mark their disapprobation"); *Porter* v. *Seiler*, 23 Pa. 424, 428 (1854); *Goddard* v. *Grand Trunk Ry. of Canada*, 57 Me. 202, 224 (1869); *Ward* v. *Ward*, 41 Iowa 686, 688 (1875).

HARV. L. REV. 517, 520 (1957)).[7] Exemplary damages were also sometimes used to compensate the plaintiff for litigation expenses. See, *e.g.*, *Welch* v. *Durand*, 36 Conn. 182, 185 (1869); *New Orleans, Jackson & Great N. R.R.* v. *Allbritton*, 38 Miss. 242, 273, 275 (1859).

Although the dominant account of punitive damages came to focus on punishment rather than compensation, the doctrine never lost its focus on the harm done to the plaintiff before the court:

> [T]he early focus of punitive damages awards was on the degree of insult to the victim, and thus the courts tailored the amount of the punitive award to the victim's social status and to the circumstances of the insult. * * * [A]lthough the courts eventually settled upon an understanding of punitive damages as punishment rather than compensation, they did not conceive of them as punishment for some amorphous wrong to society, or as punishment for the malicious act in the abstract; rather, they conceived of them as punishment for the private legal wrong—the insult—done to the individual plaintiff. * * * The vindication of the dignity of the victim was the whole point of punitive damages * * *.

Colby, *supra*, 87 MINN. L. REV. at 619, 634.

3. This conception of punitive damages accounts for several otherwise-inexplicable features of punitive damages doctrine. One is the requirement that the plaintiff prevail on an

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[7] But see Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 204-206 (2003) (arguing that footnote 11 of *Cooper Industries* is inaccurate because punitive damages in the 19th century above all redressed "the injury of insult that wounds or dishonors," which today is not a cognizable form of injury).

underlying cause of action.[8] That requirement would be entirely unnecessary if the doctrine's only purposes were to achieve general deterrence and retribution.

Moreover, in the majority of jurisdictions, punitive damage awards do not violate the double jeopardy prohibition. In the 19th century, a number of courts ruled that punitive damages were unavailable where the conduct in question was a criminal offense. *E.g.*, *Taber* v. *Hutson*, 5 Ind. 322, 325-326 (1854). Others, by contrast, ruled that there was no constitutional problem because the remedy was a form of remuneration, not punishment. *E.g.*, *Chiles* v. *Drake*, 59 Ky. (2 Met.) 146, 151-153 (1859) (object of statute authorizing punitive damage awards was "not to inflict a penalty, but to remunerate for the loss sustained").

What eventually became the majority rule "arose from the decisions of courts that took a more nuanced stance: Punitive damages do not implicate double jeopardy concerns," even though they *are* intended as punishment, "because they are intended as punishment for the wrong to the individual victim," as opposed to the wrong to society generally. Colby, *supra*, 87 MINN. L. REV. at 621. Illustrative of the dominant approach is *Hendrickson* v. *Kingsbury*, 21 Iowa 379 (1866), in which the Court stated that punitive damages did not raise double jeopardy concerns because such awards "have no necessary

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[8] English law also imposes this requirement. As Lord Devlin explained in *Rookes*: "[T]he plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence." [1964] A.C. at 1227. In the decision below, the Supreme Court of Oregon endorsed a similar "absurdity" by holding that respondent could collect a $79.5 million windfall calculated to punish the petitioner for the alleged effect of its behavior on thousands of persons with no connection at all to Williams or her lawsuit.

relation to the *penalty* incurred for the *wrong done to the public*," but are "a punishment for the *wrong done to the individual*." *Id.* at 391 (emphasis in original).[9]

B. Historically, A Plaintiff Was Entitled To Recover Exemplary Damages To Vindicate The Wrong Done Only To Her, Even When The Defendant's Actions Caused Harm To Others

Because punitive damages were never understood as a mechanism for vindicating affronts to society generally (or for that matter to anyone other than the plaintiff), plaintiffs historically were entitled to recover exemplary damages only for the wrong done to themselves, even when an act or course of conduct caused actionable harm to more than one person.

1. The two English antecedent cases arose out of an incident in which the defendants had committed affronts against a number of individuals.[10] There was, however, no suggestion in either of those cases that the punishments could or should reflect the harm done to anyone but the particular plaintiff. On the contrary, in *Huckle* v. *Money*, 2 Wils. 205, 95 Eng. Rep. 768, 769 (K.B. 1763), one of the judges noted that 15

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[9] A difficulty related to the double jeopardy problem—namely, the potential in the mass-tort context for multiple punitive awards for the same conduct, see, *e.g.*, *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 838-840 (2d Cir. 1967)—would be eliminated if courts returned to the traditional understanding of punitive awards. See generally Colby, *supra*. In that case, each plaintiff would be able to recover only a modest punitive award reflecting only the harm to himself. If, however, this Court holds that a jury may indeed punish a defendant for harms to non-parties, then the problem of multiple punishment will still exist and will have to be addressed in a future case.

[10] Professor Colby appears to be the first to have made this point. See Colby, *supra*, 87 MINN. L. REV. at 628 n.168.

other plaintiffs had brought suit against the same messengers who had imprisoned the printer's assistant, with each suit resulting—after two of the suits were tried and the rest settled—in its own punitive award. And in *Wilkes* v. *Wood*, the Lord Chief Justice's punitive damages instruction was based exclusively on one offense, that against John Wilkes: "Damages are designed not only as a satisfaction *to the injured person*, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury *to the action itself*." Lofft 1, 18-19, 98 Eng. Rep. 489, 498-499 (K.B. 1763) (emphasis added).

Even more clearly illustrative of these principles is *Tullidge* v. *Wade*, 3 Wils. 18, 95 Eng. Rep. 909 (K.B. 1769), which involved an action for assault brought by the father of a woman who had been impregnated by the defendant. The woman was permitted to testify that the defendant had promised her marriage. The court told the jury "over and over again, that, in giving damages in this action, they must *not* consider the injury done to [the daughter] as to the promise of marriage, but must leave that matter quite out of the question, because [the daughter] might have her action for breach of that promise." 95 Eng. Rep. at 909 (emphasis added).

The jury awarded £50 damages, most of which was exemplary, and the trial and appellate judges were satisfied that the jury had not punished the defendant for the broken marriage promise. In other words, even though the defendant's actions caused cognizable harm to two persons—the daughter and her father—the exemplary damages were allowed to punish, and did punish, only the wrong to the party before the court.

A number of American jurisdictions followed *Tullidge*, holding that, in an action by the father for the seduction of his daughter, evidence of a breach of a promise to marry was inadmissible to increase the size of the award, exemplary or

otherwise.[11] *E.g.*, *Robinson* v. *Burton*, 5 Del. (5 Harr.) 335, 340 (Super. Ct. 1851); *Brownell* v. *McEwen*, 5 Denio 367, 368 (N.Y. Sup. Ct. 1848); *Foster* v. *Schofield*, 1 Johns. 297, 299 (N.Y. 1806) ("The law is settled, that in a suit by the father, for debauching his daughter, the daughter cannot be a witness to prove a promise of marriage, in order to increase the damages, for she has herself a right of action against the defendant."); *Stevenson* v. *Belknap*, 6 Iowa (6 Clarke) 97, 1858 WL 120, at *4 (1858).

Even, however, in jurisdictions that did allow evidence of a broken marriage promise to increase damages in a father's seduction action, the focus remained squarely and exclusively on the *injury to the father*, not to the daughter. That is, the existence and breach of the promise were part of the circumstances of the seduction and enhanced the outrage perpetrated on the father. In *Phelin* v. *Kenderdine*, 20 Pa. 354 (1853), for example, the court explained:

> So far as the *promise of marriage* tends to show *the nature of* the *injury to the parent*, or *the means by which it was accomplished*, the evidence is as pertinent as any other circumstance which gives character to the transaction; and the only instruction which the defendant has a right to require in regard to such evidence is, that the jury must not

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[11] The principle that the father's and daughter's claims were separate and that exemplary damages could vindicate only the party before the court is also illustrated by one of the earliest American punitive damages cases, an action seeking exemplary damages for breach of a marriage promise. In *Coryell* v. *Colbaugh*, 1 N.J.L. 77 (N.J. 1791), the court refused to permit the defendant to introduce evidence that the father had already recovered from the defendant an exemplary award in his own action for the seduction. "[I]t was against every rule of evidence," the court explained, "that a verdict between other parties * * * should prejudice a person not party or privy to the record; that * * * the plaintiff could claim no benefit from the other suit. It was her father's action—she is not to be affected by it here."

> award *to the father* any part of the damages which belong to the daughter, by reason of the breach of the contract of marriage.

Id. at 362 (emphasis in original). Accord *White* v. *Campbell*, 54 Va. (13 Gratt.) 573, 574 (Va. 1856) (noting that "[e]vidence of the means by which the seduction was accomplished" aggravates "the offender's wrong, and show[s] the extent of the father's loss").

2. Of course, the traditional common law torts for which punitive damages were usually awarded—catalogued by Judge Friendly in *Roginsky*, 378 F.2d at 838—may not seem analogous to the "mass torts" that became possible only after the Industrial Revolution. A large enterprise arguably is capable of causing harms that are different in kind and in the number of victims from those on which the traditional common law actions were based.

Economists have much to say about how the existence of mass torts bears on calibrating deterrent punishments. From the standpoint of legal history, however, the question of how to analyze post-Industrial Revolution punitive damages depends on their closest historical antecedents. With this in mind, we have examined every reasonably accessible[12] pre-1870 American case brought against a corporation that deals with the subject of punitive damages.

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[12] Our conclusions are based on searches of the Westlaw database, whose holdings for early American law are extensive but not complete. According to Thomson West, the company set out to collect the cases in all the reporters identified in the 16th edition of the Bluebook, but did not complete that objective because tracking down some of the volumes turned out to be impracticable. Sampling—based on testing to see whether cases referenced in the early decisions are available in the Westlaw database—suggests that the database includes the overwhelming majority of reported 19th-century decisions.

a. Analysis of these early decisions reveals *not a single instance* in which a court approved a punitive damage award that reflected harm to other parties not before the court.[13] Far from approving punitive damages awards that reflected harm to non-parties, the early decisions reflect the assumption that it was entirely out of the question to punish a defendant for its general course of conduct or even for acts similar to, but other than, the ones that caused the plaintiff's injury. For example, in *Holyoke* v. *Grand Trunk Railway*, 48 N.H. 541 (1869), the trial court prevented the plaintiff from introducing, in support of his claim for exemplary damages, evidence that the defendants' railroad track was in an unsafe condition at places other than the site of the accident that caused the complained-of injuries. If punitive damages had been understood as a way of punishing a defendant for an entire course of objectionable conduct, there would have been no reason to exclude this evidence.

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[13] The closest thing we have found might be a statement in *Whipple* v. *Walpole*, 10 N.H. 130 (1839), which involved a claim for damages for the loss of horses caused by a defect in a bridge. In justifying an exemplary award, the court noted that the defendants neglected "a duty, in which the public at large have a deep interest. * * * In this very case, * * * three individuals were suddenly destroyed, and others exposed to most imminent peril." 10 N.H. at 132-133. Because the court's opinion otherwise mentions no loss or destruction of human life, it appears that the"three individuals * * * suddenly destroyed" were the *horses* at issue, odd as that locution may seem 167 years later. *Even if* the court was referring to harm to persons not before the court, however, its discussion does not mean that the defendants were punished for harm to others. Rather, the court's discussion reflects the principle that the *reprehensibility* of conduct can be a function of the amount of danger it creates. This distinction—which the Supreme Court of Oregon utterly failed to grasp—is a familiar one both in the criminal law and in this Court's punitive damages cases. See Pet. 16-18 & n.6. *Whipple*, moreover, was later overruled. See note 28, *infra*.

b. In briefs filed in this Court's recent punitive damages cases, parties or *amici* have asserted that historically juries were permitted to take into account a defendant's conduct vis-à-vis other plaintiffs in awarding exemplary damages. That argument, however, has been based on a flatly misleading reference to an 1830 treatise.

The respondents in *State Farm* argued:

> [P]unitive damages have always been imposed on the basis of the totality of a defendant's conduct, including "other acts," not merely according to what the defendant did to the particular plaintiff before the court. As one commentator wrote in 1830, "circumstances *which form no part of the actionable matter of a suit*, may be given in evidence to aggravate damages." Theron Metcalf, *Damages Ex Delicto*, 3 AM. [JUR. &] L. MAG. 270, 287 (1830) (emphasis added).

Br. of Resp., *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, No. 01-1289, at 37-38 (U.S. Oct. 17, 2002) (hereinafter *State Farm* Resp. Br.); see also Br. of Legal Historians in Supp. of Resp., *BMW of N. Am., Inc.* v. *Gore*, No. 94-896, at 18 (U.S. May 31, 1995) (hereinafter *Gore* Historians' Br.) (using identical quotation for similar point).

What Metcalf actually said, however, is that such circumstances may *not* be given in evidence. Here, in pertinent part, is the full passage:

> *It is said by elementary writers and by compilers*, that * * * circumstances, which form no part of the actionable matter of a suit, may be given in evidence to aggravate damages. * * *
>
> The proper meaning, it is apprehended, of the phrase[] * * * 'in aggravation of damages,' is often palpably mistaken. When evidence is given for the purpose of showing that the *injury received* is greater * * * than it

> would appear to be if such evidence were not introduced, it may properly be said to be received in aggravation * * * of damages; and in no other instance. *And it is the purpose of this examination to show that neither on principle, nor by the preponderance of authority, can damages be estimated by any other standard than the actual injury received*—that the extent of the injury is the legal measure of damages.

Metcalf, *supra*, 3 AM. JUR. & L. MAG. at 287-288 (emphasis added in part). In fact, not only did Metcalf squarely reject the idea that juries could take into account circumstances outside the plaintiff's cause of action, he was also an early proponent of the view that punitive damages as we understand them today—an award for a non-compensatory purpose—did not exist.[14]

c. The point that juries historically could not take into account—indeed, probably could not even learn of—harm to non-parties is illustrated by punitive damages cases arising out of accidents that injured additional parties beyond the individual plaintiff. In such cases, court never even contemplated the possibility of awarding punitive damages on the basis of such

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[14] Metcalf wrote:

> Damages are given as a satisfaction *for an injury received by the plaintiff, not by the public*. The term *vindictive*, when applied to damages given by a jury, is unfortunate, and liable to strange misapprehension. * * * [I]t means nothing more, when truly understood, than * * * that damages may be given for insult, contumely, and abuse, not in themselves actionable, when they *accompany* an actionable injury. And that in any other sense, such damages are unknown and unwarranted by the common law.

3 AM. JUR. & L. MAG. at 305-306 (first emphasis added). In fact, Metcalf was said to be the ancestor of Greenleaf's position, see note 5, *supra*. Sedgwick, *supra*, 5 W.L.J. at 193.

injuries. In *Holyoke*, for example, the plaintiff sought exemplary and compensatory damages after the railcar he was riding in, which "was running at an unusually rapid speed," ran off the road, down an embankment, and into a pond, where it came to rest upside-down twelve feet below the track. 48 N.H. at 543. There was no discussion in the case of other victims (which it seems fair to assume there were, since it would have been a miracle if the accident had injured no one else), let alone a suggestion that an exemplary award could reflect harm to them. The same was true of *Taylor* v. *Grand Trunk Railway*, 48 N.H. 304 (1869). There two passenger cars went off the rails and down a bank, turning nearly upside-down, *id.* at 307, but the court did not even contemplate that Taylor's exemplary award could reflect what surely must have been injuries suffered by others. Likewise, in *Weed* v. *Panama Railroad*, 17 N.Y. 362 (1858), the plaintiff obtained a $2000 verdict, which apparently included an exemplary component, for injuries suffered when his train was detained. Four hundred other passengers were stuck on the same train, yet there was no suggestion that Weed's award was based in any way on the harm to the others.[15]

d. Finally, in the few cases in which courts did consider whether a plaintiff could collect punitive damages for other parties' injuries, they answered that question in the negative. In *Black* v. *Carrollton Railroad*, 10 La. Ann. 33 (La. 1855), for example, the plaintiff was the father of a 14-year-old boy whose legs were broken when the railroad car he was riding in flipped over. The father had sought damages for medical

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[15] Other illustrations of this point are *Hopkins* v. *Atl. & St. Lawrence R.R.*, 36 N.H. 9 (1857) (no suggestion that harm to other passengers could be a consideration in calculation of exemplary award in suits for injuries of plaintiff and wife sustained in train collision); *Varillat* v. *New Orleans & Carrollton R.R.*, 10 La. Ann. 88 (La. 1855); *Frink & Co.* v. *Coe*, 4 Greene 555 (Iowa 1854); *Penn. R.R.* v. *McCloskey's Adm'r*, 23 Pa. 526 (1854).

expenses and the neglect of his business, and the court estimated his actual damage at $5000. *Id.* at 37-38. The jury, however, awarded $10,000. The court overturned the verdict because it believed that there was no "right to recover vindictive damages, to others than those who, in their own proper persons, are victims of the misconduct of" a railroad company. *Id.* at 38. Similarly, in *Baltimore & O. S.W. Railway* v. *Keck*, 89 Ill. App. 72 (1899), the court held that a father was entitled to recover "compensation only for the loss he had sustained on account of the negligent act of the railroad company in injuring his boy. He was entitled to nothing on account of the pain and suffering of his son, *or as exemplary damages. Such damages could only be recovered in a suit by the boy.*" *Id.* at 77-78 (emphasis added).

Identical principles yielded the opposite outcome in *Bradley* v. *Andrews*, 51 Vt. 525 (1879). There the father was permitted to recover exemplary damages for injuries to the son, but only because the son had initiated his own negligence action before he died, and a Vermont statute transferred a deceased's cause of action to the administrator of his estate, which in this case was the father. Without the statutorily conferred ability to prosecute his son's cause of action, the father could not have recovered exemplary damages, even though he had initiated his own suit to recover for loss of services and the expense of caring for the son.[16]

These patterns continued into the 20th century. For example, in *Tidd* v. *Skinner*, 122 N.E. 247 (N.Y. 1919), the plaintiff sued to recover for loss of the services of her son, who had become addicted to heroin sold by the defendant pharmacists. The court observed that punitive damages when available

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[16] The Supreme Court of Vermont's earlier decision in *Earl* v. *Tupper*, 45 Vt. 275, 288 (1873), contains rhetoric that is in tension with this interpretation, but the holding of that case is entirely consistent with it.

"are allowed to the person directly injured in cases of wrong committed with malice * * *. We are of the opinion that such damages do not in this case come within the reason on which the common-law action in favor of a third person is sustained." *Id.* at 251. See also *Bube* v. *Birmingham Ry., Light & Power Co.*, 37 So. 285, 286 (Ala. 1904) (punitive damages not available to father suing street car company for loss of his son's services); *French* v. *Orange County Inv. Corp.*, 13 P.2d 1046, 1048 (Cal. Dist. Ct. App. 1932) ("Exemplary damages are allowed only to the immediate person receiving the injury, either in a suit prosecuted by himself or by some one for his use." (citation and internal quotation marks omitted)); cf. *Pickle* v. *Page*, 233 N.Y.S. 461, 470 (App. Div. 1929) (allowing parent to recover punitive damages for child's kidnaping because "the injury is primarily and directly, and indeed chiefly, to the parent").

II. There Is No Historical Basis For Upholding Punitive Awards That Are Many Multiples Of The Compensatory Award When The Compensatory Award Itself Is Substantial

A. Before the ratification of the Fourteenth Amendment, so long as actual damages were not trivial, it was extremely rare for a court to approve an award whose punitive component was many multiples larger than the compensatory component.

For one thing, juries were rarely inclined to impose large awards. There are many decisions overturning verdicts because the jury, in response to erroneous instructions or on its own initiative, included an apparently exemplary award in a case that (for want of the requisite wantonness, malice, or gross negligence, or otherwise) did not permit it. Even in those cases,

however, the punitive amount tended to be a modest supplement to the compensatory component.[17]

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[17] See, *e.g.*, *Franz* v. *Hilterbrand*, 45 Mo. 121 (1869) (overturning verdict awarding $200 in punitive damages beyond $300 compensation for killing horses); *Beveridge* v. *Rawson*, 51 Ill. 504 (1869) (award of $1236.72, of which $500 was compensatory, for seizure and sale of house overturned); *Cram* v. *Hadley*, 48 N.H. 191 (1868) (verdict containing $51.98 exemplary award in addition to $42.29 compensatory award for entering land and carrying away logs overturned); *Toledo, Pac. & W. Ry.* v. *Arnold*, 43 Ill. 418 (1867) (verdict containing $30 exemplary award in addition to $411 compensation for livestock killed by railroad cars overturned); *Ackerson v. Erie Ry.*, 32 N.J.L. 254 (N.J. 1867) ($8500 verdict limited to $6500 as compensation for injuries sustained when railway car went off road and down embankment); *Moore* v. *Bowman*, 47 N.H. 494 (1867) (overturning verdict awarding $25 in exemplary damages beyond $115 compensatory award for wrongful attachment of a horse); *Moody* v. *McDonald*, 4 Cal. 297 (1854) (overturning verdict awarding $2500 in "smart money" beyond $2500 compensatory award for injuries caused by negligent blasting); *Singleton's Adm'r* v. *Kennedy, Smith & Co.*, 48 Ky. (9 B. Mon.) 222 (1848) (overturning verdict awarding $173.14 beyond cognizable injury of $684 because vindictive damages not available); see also *New Orleans, Jackson & Great N. R.R.* v. *Moore*, 40 Miss. 39 (1866) (verdict awarding $222, in addition to $528, the value of trunk lost by defendant railroad, overturned because exemplary damages not appropriate in contract action); *Androscoggin R.R.* v. *Richards*, 41 Me. 233 (1856) (overturning award that included $23.69 in addition to compensation of $191.54 for seizure of liquor); but see *Dickinson* v. *Maynard*, 20 La. Ann. 66 (La. 1868) (reducing $885 verdict for wrongful attachment to $101.66, representing actual damages, because exemplary damages not allowed); *Anding* v. *Perkins*, 29 Tex. 348 (1867) (overturning award for breach of warranty in the sale of a certificate for land in which compensatory component was $60 and punitive component was $580 because jury was wrongly instructed); *Palmer, Cooke & Co.* v. *Stewart*, 2 Cal. 348 (1852) (verdict awarding $2500 overturned where cognizable compensatory damages were probably not more than $50).

Where punitive damages were available, and juries did award them, the vindictive component of the award still was expected to bear some kind of correspondence to the compensatory component. See, *e.g.*, *Walker* v. *Martin*, 52 Ill. 347, 351 (1869) (reversing verdict in which punitive component was 40 times larger than compensatory component because vindictive damages must "must bear some sort of proportion to the injury done"); *Grant* v. *McDonogh*, 7 La. Ann. 447, 448 (La. 1852) ("exemplary damages allowed should bear some proportion to the real damage sustained"); see also *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 580 n.32 (1996) (citing late 19th-century state-court cases for the same principle); *TXO Prod'n Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 459 n.25 (1993) (plurality opinion); *id.* at 479 n.3 (O'Connor, J., concurring).

The reason for this sort of proportionality is clear. Because, as discussed above, 19th-century jurists understood punitive damages as a particularized punishment for the wrong to the individual before the court, their "notion [was] that the proper amount of punitive damages depends on the severity of the injury to the plaintiff." Colby, *supra*, 87 MINN. L. REV. at 639.

Thus, in practice punitive awards upheld on appeal were almost never more than one or two times the amount of the compensatory award.[18] Multiples higher than this were rare.[19]

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[18] See, *e.g.*, *Welch* v. *Durand*, 36 Conn. 182 (1869) (verdict awarded $200 for the injury received when the defendant fired a gun, plus $150 "smart money" for expenses of litigation due to defendant's wanton misconduct and culpable neglect); *Johnson* v. *Camp*, 51 Ill. 219 (1869) (jury may have awarded $107 "smart money" for taking away $363 worth of wheat and oats); *Andrea* v. *Thatcher*, 24 Wis. 471 (1869) ($200 in exemplary damages in addition to $185.78 compensation for damage to furniture that occurred when plaintiff and his family were ejected from his house); *Garland* v. *Wholeham*, 26 Iowa 185 (1868) ($1700 verdict for damage to property, the total value of which was not more than $1020); *Garland* v. *Wholebau*, 20 Iowa 271 (1866) ($200 exemplary damages in addition to $500 com-

To be sure, some have argued that larger awards are needed to deter or inflict meaningful retribution on a corporation, especially a large one, than on an individual. Whether or not that proposition is sound as an economic or policy matter,[20]

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pensation for shooting horses); *Lynd* v. *Picket*, 7 Minn. 184 (1862) ($168.59 exemplary damages, or $150 plus interest to time of trial, for a wrongful attachment of property worth $267); *Tifft* v. *Culver*, 3 Hill 180 (N.Y. 1842) ($2.52 in exemplary damages beyond $3.37 as compensation for wilfully overturning wagon); *Wort* v. *Jenkins*, 14 Johns. 352 (N.Y. 1817) ($75 verdict for beating to death a horse worth $50 or $60); *Woodman* v. *Nottingham*, 49 N.H. 387 (1870) ($100 exemplary, $578 actual); *Newell* v. *Whitcher*, 53 Vt. 589 (1880) ($225 for mental suffering for a threatening sexual advance made on a young blind woman, plus $100 in punitive damages); *S. Kan. Ry.* v. *Rice*, 16 P. 817 (Kan. 1888) ($71.75 punitive award in addition to $10 for injury to feelings and $35 for costs and fees).

[19] Aside from the cases in which actual damages were truly trivial, see II.B., *infra*, the only pre-1870 American examples we have found in which a multiple clearly higher than 2 was upheld on appeal are *Pendleton* v. *Davis*, 46 N.C. (1 Jones) 98 (1853) ($1100 verdict, of which $1000 was exemplary damages, awarded against a wealthy defendant for a blow to plaintiff's head), *Kountz* v. *Brown*, 55 Ky. (16 B. Mon.) 577 (1855) ($750 verdict; defendant complained on appeal that three-fourths of it was "smart-money"), and *New Orleans, Jackson & Great N. R.R.* v. *Hurst*, 36 Miss. 660 (1859). *Hurst* was disavowed only a decade later by the same court that issued it. See page 29, *infra*.

[20] Trenchant economic analyses conclude that "corporate wealth should not influence punitive damages." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 911 (1998); see also *id.* at 911 n.131 (citing authorities to the same effect). Punishing corporations more because they are wealthy also runs afoul of "the Aristotelian notion of corrective justice, and more broadly of the principle of the rule of law, * * * that sanctions should be based on the wrong done rather than on the status of the defendant; a person is punished for what he

courts and juries have long found it appealing. Many States permit juries to take into account the wealth of the defendant in calculating an exemplary award, on the theory "that a penalty which would be sufficient to reform a poor man is likely to make little impression on a rich one; and therefore the richer the defendant is the larger the punitive damage award should be." Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1191 (1931). Similarly, some courts around the time of ratification of the Fourteenth Amendment believed that large awards were needed to capture the attention of large corporations.[21]

In our survey of every reasonably available pre-1870 case involving punitive damages brought against a corporation,[22] many cases do not make the relevant ratios clear. In the few that do, however, the punitive awards were modest supplements to the compensatory award. See *Taylor* v. *Grand Trunk Ry.*, 48 N.H. 304 (1869) ($858.50 punitive award for injuries suffered in railroad accident where actual damages were $500); *Vicksburg & Jackson R.R.* v. *Patton*, 31 Miss. 156 (1856) ($660 punitive award in addition to $550 to compensate for horses run over by train). Several verdicts with enormous ratios were upheld on appeal, but these decisions, as explained in II.C., *infra*, either were renounced soon after by the same court or involved very low actual damages.

Nor was there any sharp change after the ratification of the Fourteenth Amendment. Vindictive awards against corpora-

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does, not for who he is, even if the who is a huge corporation." *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003) (Posner, J.).

[21] *E.g.*, *Williamson* v. *W. Stage Co.*, 24 Iowa 171, 172 (1867); see also *Goddard* v. *Grand Trunk Ry. of Canada*, 57 Me. 202, 223-228 (1869).

[22] See note 12, *supra*.

tions out of all proportion to compensatory damages continued to be reduced or overturned well into the last century. See, *e.g.*, *Flannery* v. *Baltimore & Ohio R.R.*, 15 D.C. (4 Mackey) 111 (1885) ($5000 verdict of which only $500 was compensatory had to be remitted to $1500, for a ratio of 2:1); *Int'l & G.N.R. Co.* v. *Telephone Tel. Co.*, 5 S.W. 517, 518-519 (Tex. 1887) (setting aside, because of "the disproportion between the actual injury sustained and the aggregate sum awarded," $10,000 verdict in which the exemplary damages were almost 50 times larger than the actual damages); *Rider* v. *York Haven Water & Power Co.*, 95 A. 803 (Pa. 1915) (reversing verdict awarding $2700 where actual damages were $1000 and noting that "[w]e know of no case in our own state where punitive damages were allowed in almost treble the amount of the actual damage sustained"); *Hunter* v. *Kansas City Rys. Co.*, 248 S.W. 998, 1003 (Mo. Ct. App. 1923) ("in this case an award of five times the actual damages inflicted is clearly excessive; an award of three times the actual damages, or $1,500, is amply sufficient"); *Hall Oil Co.* v. *Barquin*, 237 P. 255, 276-280 (Wy. 1925) (where actual damages were $1250, sustaining $1088 punitive award against one defendant and reducing award against another from $23,928 to $8000).

B. It is not controversial that, when actual damages are small, a higher multiplier might be appropriate to achieve some of the functions of punitive awards. *E.g.*, *State Farm*, 538 U.S. at 425; *Gore*, 517 U.S. at 582; see also *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676-677 (7th Cir. 2003) (Posner, J.). Thus historic cases with truly gigantic ratios usually involved insignificant actual damages.[23] In *Williamson* v.

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[23] In fact, at least one and probably both of the two antecedent English cases fit this pattern. In *Huckle* v. *Money*, which resulted in an award of £300, the actual injury, according to the Lord Chief Justice, was worth approximately £20, 95 Eng. Rep. at 769, which, in very approximate terms, is equivalent to several thousand dollars today. See *Gore*, 517 U.S. at 597 (Breyer, J., concurring) (deducing

Western Stage Co., 24 Iowa 171 (1867), for example, the court upheld a $375 verdict for injuries resulting from being overturned in a coach. That was many multiples of the plaintiff's actual damages, but those were tiny—he spent no more than $2 on remedies for his injuries. See also, *e.g.*, *Beaudrot* v. *S. Ry.*, 48 S.E. 106 (S.C. 1904) ($1000 exemplary damages where actual damages from trespass were about $2.50); cf. *Seaboard Air Line Ry.* v. *Seegers*, 207 U.S. 73, 75-76, 78 (1907) (upholding state statute imposing $50 penalty for not timely settling claim for lost shipment valued at $1.75); *St. Louis, I.M. & S. Ry.* v. *Williams*, 251 U.S. 63, 64, 67 (1919) (upholding statutory penalty of $75 plus costs of suit for overcharging two young sisters by 66 cents).

Plainly, this recognized exception has no application here. Respondent's compensatory award alone was $821,485.50, of which 97 percent were *non-economic* damages. It was on *top* of this that respondent was awarded $79.5 million to punish Philip Morris USA for the total harm it was supposed to have inflicted in Oregon. In *Seaboard Air Line*, this Court justified the disparity between the $50 penalty and the $1.75 of actual damages on the ground that, "[i]f a large amount is in controversy, the claimant can afford to litigate. But he cannot well do so when there is but the trifle of a dollar or two in dispute * * *." 207 U.S. at 78. Here that rationale is as irrelevant as can be; there has been no shortage of plaintiffs willing to litigate against tobacco companies. The award approved by the Supreme Court of Oregon, it should be clear, finds no support at all in the historical tradition of using a high multiplier to create a meaningful penalty when the actual damage is slight—or, indeed, in any historical tradition at all.

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that £1 in 1763 is worth between $89.11 and $144.40 in 1995 U.S. dollars). In *Wilkes* v. *Wood*, the plaintiff demanded "large and exemplary damages" because "trifling damages would put no stop at all to such proceedings," 98 Eng. Rep. at 490.

C. In this Court's recent punitive damages cases, defenders of enormous awards frequently have asserted that high ratios of punitive to compensatory awards have a strong historical pedigree.[24] They do not. The early American cases cited in support of that proposition by the respondents and *amici* in this Court's punitive damage cases either (1) did not involve punitive damages at all, as opposed to compensatory damages for non-economic injury,[25] or (2) concerned situations in which actual damages were insignificant;[26] or (3) were soon disa-

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[24] See *Gore* Historians' Br. 3-10; Br. of Resp., *Gore*, at 41 & n.53 (hereinafter *Gore* Resp. Br.); *State Farm* Resp. Br. 14-15 & n.2; Br. of Resp., *TXO Prod. Corp.* v. *Alliance Resources Corp.*, No. 92-479, at 26-28 & nn.24-25 (U.S. Mar. 3, 1993) (hereinafter *TXO* Resp. Br.).

[25] *Reed* v. *Davis*, 4 Pick. 216, 218 (Mass. 1826) (verdict compensated not just for economic harm but for "the mental suffering which must have been endured"), cited in *Gore* Historians' Br. 6, *Gore* Resp. Br. 41 n.53, *State Farm* Resp. Br. 15 n.2, and *TXO* Resp. Br. 27 n.25; *Johnson* v. *Hannahan*, 34 S.C.L. 425, 1849 WL 2662 (S.C. Ct. App. L. 1849) ($3000 verdict where pecuniary harm was $20; surplus "rendered for insult and matter of aggravation"), cited in *Gore* Historians' Br. 6; *Seaman* v. *Dexter*, 114 A. 75, 76 (Conn. 1921) ($318 awarded for economic loss; the rest of the $5000 award was not for punitive damages but "compensation for pain, suffering, and permanent injury and discomfort"), cited in *Gore* Historians' Br. 6 n.2 and *State Farm* Resp. Br. 15 n.2.

[26] *E.g.*, *Cathey* v. *St. Louis & S.F.R. Co.*, 130 S.W. 130, 131 (Mo. Ct. App. 1910) (9:1 ratio in award for an assault that caused injuries worth $50), cited in *Gore* Resp. Br. 41 n.53, *Gore* Historians' Br. 9, and *State Farm* Resp. Br. 15 n.2; *St. Louis, I.M. & S. Ry.* v. *Williams*, 251 U.S. 63 (1919) (discussed above), cited in *State Farm* Resp. Br. 15; *Pelton* v. *General Motors Acceptance Corp.*, 7 P.2d 263 (Or. 1932) (punitive award 19.6 times larger than compensatory award upheld where compensatory damages were $255), cited in *Gore* Historians' Br. 6, *Gore* Resp. Br. 41 n.53, and *State Farm* Resp. Br. 15; *Alcorn* v. *Mitchell*, 63 Ill. 553 (1872) ($1000 exemplary award

vowed by the same court that approved the award. Examples of the first two categories are furnished in the margin. The prime example of the third category is *New Orleans, Jackson & Great Northern R.R.* v. *Hurst*, 36 Miss. 660 (1859), which approved an enormous punitive award where actual damage was limited, and which was cited to this Court by respondents in four recent punitive damages cases, as well as by the self-styled legal historians as *amici* in *Gore*.[27] None of the briefs, however, disclosed that a decade later the very same court, in a case against the same defendant, expressly disavowed its earlier decision: "With all due respect and deference to the opinion of our able and distinguished predecessors, we think the verdict should have been set aside in that case." *New Orleans, Jackson & Great N. R.R.* v. *Statham*, 42 Miss. 607, 628 (1869).[28]

If these are the best cases defenders of high ratios can come up with to "prove" the historical pedigree of high ratios, then the conclusion must be just the opposite: punitive damages in enormous ratio to significant compensatory damages have no

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where the defendant, who had just lost a trespass suit, spat in the face of his adversary in court), cited in *State Farm* Resp. Br. 15, *Gore* Historians' Br. 6, and *Gore* Resp. Br. 41 n.53.

[27] Br. of Resp., *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, No. 99-2035, at 20 n.11 (U.S. Jan. 16, 2001); *Gore* Historians' Br. 7, 19, 21; *Gore* Resp. Br. 41 n.53; *State Farm* Resp. Br. 15; *TXO* Resp. Br. 27 n.25, 32, 38.

[28] Along similar lines, briefs in previous cases cited for support *Whipple* v. *Walpole*, 10 N.H. 130 (1839), as well as at least one other pre-1870 New Hampshire case, *Taylor* v. *Grand Trunk Ry.*, 48 N.H. 304 (1869). See *Gore* Historians' Br. 7 n.3, 8, 12, 16 n.9, 27 n.18, 30 n.23; *TXO* Resp. Br. 27 n.25, 28 n.26. These briefs did not note that *Whipple* was expressly overruled on at least two grounds in *Woodman* v. *Town of Nottingham*, 49 N.H. 387 (1870), and that, several years after that, New Hampshire's high court renounced exemplary damages altogether. See note 5, *supra*.

historical support at all. They are an innovation of the late 20th century, resembling their precursors in name but in no other respect. History is no reason to shield them from exacting constitutional scrutiny, and is in particular no reason to allow the wholly arbitrary imposition of punishment and deprivation of property without traditional due process of law.

CONCLUSION

The judgment of the Supreme Court of Oregon should be reversed.

Respectfully submitted.

SHERMAN JOYCE
American Tort Reform Association
1850 M Street, N.W.
Suite 1095
Washington, D.C. 20036
(202) 682-1163

ROY T. ENGLERT, JR.*
ALAN E. UNTEREINER
DANIEL R. WALFISH
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

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In The
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PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

LEWIS S. EIDSON
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 965-3500
President,
The Association of Trial Lawyers of America

GERSON H. SMOGER, PH.D.*
SMOGER & ASSOCIATES
3175 Monterey Boulevard
Oakland, California 94602
(510) 531-4529

BRENT M. ROSENTHAL
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, Texas 75214
(214) 521-3605
Attorneys for Amicus Curiae Association of Trial Lawyers of America

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae. Letters of blanket consent of the parties to the filing of amicus briefs have been filed with the Court.[1]

ATLA is a voluntary national bar association with approximately 50,000 members who primarily represent individual plaintiffs in civil actions. Occasionally, ATLA members claim and recover punitive damages on behalf of their clients when they can demonstrate that the clients suffered harm as a result of the defendant's reprehensible conduct. ATLA believes that the remedy of punitive damages is a vital tool both in deterring wrongful conduct and in promoting public safety. These beneficial social purposes would be significantly diminished if the Court were to adopt a "one-size-fits-all" constitutional cap on the ratio that a punitive damages award must bear to the compensatory award that it supplements. ATLA, as a national organization with members in all states, also believes that the Constitution gives states the latitude to follow an approach to punitive damages that allows the finder of fact to consider all of the harm inflicted by the wrongdoer in the state in calculating a punitive damages award. ATLA files this brief in support of Respondent to urge the Court to refrain from stating a specific, arbitrary constitutional test for excessiveness, and instead to continue to measure the constitutional validity of a punitive damages

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[1] Pursuant to Rule 37.6, amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

award primarily by the reprehensibility of the defendant's conduct.

SUMMARY OF ARGUMENT

The Court should decline the invitation of Philip Morris and its supporting amici curiae to simplify the Court's task of reviewing punitive damages awards for constitutional excessiveness by specifying a ratio of punitive to compensatory damages that a punitive award cannot exceed. The Court has repeatedly rejected pleas to endorse a specific constitutional cap, recognizing that any formula would deprive state courts of the flexibility to allow larger awards in cases (like this one) in which the conduct punished is especially reprehensible, the harm is difficult to detect or to redress, or the wrongdoer – though unquestionably guilty and found so by the jury – is likely to evade appropriate punishment. A formulaic cap is inconsistent with the reasonable standards for calculating punitive damages used by many states, which have chosen to control punitive damages by methods other than a strict multiplier. And a constitutional cap on punitive damages would limit the deterrent effect of such awards by making their amounts predictable, enabling businesses to budget for punitive damages as a cost of doing business. The Court should therefore continue to resist the call to adopt a mathematical cap on awards of punitive damages.

The Court should also reject the contention that the Due Process Clause mandates that the jury consider only the injury sustained by the plaintiff in setting an award of punitive damages. Many states authorize the jury to take into account all effects of the defendant's conduct within

the state in assessing punitive damages, and Philip Morris and its supporters have shown no good reason for overriding this rational policy choice. Philip Morris' ability to avoid liability in other litigation through the success of defenses unrelated to its reprehensible conduct is a reason to allow, not to prohibit, consideration of the full extent of harm caused by the defendant in the state. States that allow consideration of the harm done by the defendant to others in assessing punitive damages afford the defendant protection from repetitive punitive awards by restricting the number of awards that can be assessed against the defendant, by allowing the defendant to present to the factfinder evidence of payment of prior awards to mitigate its liability, or by authorizing the court reviewing the award to consider prior punitive awards in determining whether the award is excessive. Each of these safeguards adequately protects defendants like Philip Morris from the risk of repetitive awards, and are all that the Due Process Clause requires.

ARGUMENT

I. The Court Should Not Adopt a Specific Multiplier of Compensatory Damages as a Constitutional Cap on Awards of Punitive Damages.

In his dissenting opinion in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 607 (1996), Justice Scalia warned that the Court's recognition of a constitutional limit on the size of awards of punitive damages would turn every complaint that a punitive award is excessive "into a question of constitutional moment, subject to review in this Court." As Justice Scalia predicted, the Court has become a routine stop in the appellate process

for defendants found liable for punitive damages. Commentators have noted the irony that under the Court's recent decisions, a criminal defendant has no viable argument that a sentence of imprisonment is constitutionally excessive, but a business assessed punitive damages for recklessly endangering consumers of its products enjoys constitutional protection. *See, e.g.*, Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1051 (2005); Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 516 (2005). The Court has nevertheless added to its workload the task of reviewing inherently subjective state court awards intended to punish and deter reprehensible conduct.

Petitioner Philip Morris attempts to make the Court's task easier by proposing that the Court adopt a precise constitutional cap of four times the compensatory damages. Pet. Br. 34-35. The method proposed by Philip Morris for easing the Court's workload conflicts with repeated refusals to adopt such a cap in recent cases. It also clashes with the approaches taken by many states in policing punitive damages awards for excessiveness and would diminish the deterrent effect of punitive awards.

A. This Court Has Repeatedly Rejected Entreaties To State with Precision the Maximum Ratio That an Award of Punitive Damages Must Bear to Compensatory Damages.

From the time that the Court first discovered in the Due Process Clause a substantive right for defendants in tort cases to be free from excessive awards of punitive damages, the Court has been urged to announce a formula

for determining when a punitive damages award is constitutionally excessive. Recognizing that one of the virtues of the common-law system for punishing tortfeasors is its flexibility, the Court has consistently and emphatically rejected these requests. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (the Court has "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) ("Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award. . . . It is appropriate, therefore, to reiterate our rejection of a categorical approach.") (emphasis in original); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) ("We have recognized that the relevant constitutional line is inherently imprecise rather than one marked by a simple mathematical formula.") (internal quotation marks and citations omitted); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."). In *Campbell*, the Court observed that "[s]ingle-digit multipliers are *more likely* to comport with due process," 538 U.S. at 425 (emphasis added), but the Court did not retreat from its previous rejection of a fixed or even presumptive constitutional cap.

Moreover, the proposal of a strict cap on the ratio between punitive and compensatory damages conflicts

with the tradition of proportionality that served as the basis for the ratio guidepost in *Gore*, which measured proportionality of the punitive award to the *harm*, not to the compensatory award. To be sure, the text of the *Gore* opinion referred to the relation between punitive and compensatory damages, 517 U.S. at 581, but the supporting footnote makes clear that the comparison is to actual damage or injury:

> *See, e.g., Grant v. McDonogh*, 7 La. Ann. 447, 448 (1852) ("[E]xemplary damages allowed should bear some proportion to the *real damage sustained*"); *Saunders v. Mullen*, 66 Iowa 728, 729, 24 N.W. 529 (Iowa 1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large"); *Flannery v. Baltimore & Ohio R. Co.*, 15 D.C. 111, 125 (1885) (when punitive damages award "is out of all proportion to the *injuries received*, we feel it our duty to interfere"); *Houston & Texas Central R. Co. v. Nichols*, 9 Am. & Eng. R.R. Cas. 361, 365 (Tex. 1882) ("Exemplary damages, when allowed, should bear proportion to the *actual damages sustained*"); *McCarthy v. Niskern*, 22 Minn. 90, 91-92 (1875) (punitive damages "enormously in excess of what may justly be regarded as compensation" for the injury must be set aside "to prevent injustice").

517 U.S. at 581 n.32 (emphasis added).

The significance of the distinction between comparing a punitive award to the compensatory award and comparing the punitive award to the harm sustained lies in the reality that not all significant harms are fully compensated. For example, in many states, wrongful deaths are notoriously undercompensated because of statutory – and,

frequently, idiosyncratic – limitations on the amount of damages recoverable. Some state wrongful death statutes impose a ceiling on recoverable damages, regardless of the severity of the actual loss.[2] In many jurisdictions wrongful death recoveries are limited to economic loss and do not include damages for pain and suffering that the victim might have recovered.[3] The wrongful death of a child, for example, which generally causes only limited demonstrable economic loss, often results in extremely low compensation when compared to the magnitude of the harm. Consequently, courts reviewing punitive awards in wrongful death cases have often taken uncompensated harm into account. The California Court of Appeals recently offered this compelling analysis:

> It would be unacceptable public policy to establish a system in which it is less expensive for a defendant's malicious conduct to kill rather than injure a victim. Thus, the state has an extremely strong interest in being able to impose sufficiently high punitive damages in malicious-conduct wrongful death actions to deter a "cheaper to kill them" mind set, . . . [T]he proportionality inquiry must focus, in any event, on the relationship of punitive damages to the harm to

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[2] *See* Stuart M. Speiser, Charles F. Krause & Juanita M. Madole, RECOVERY FOR WRONGFUL DEATH AND INJURY § 3.6 (3d ed. 1992).

[3] *See, e.g.*, CAL. CIV. PROC. CODE § 377.34:

> [T]he damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

and *see generally* Speiser et al., *supra* note 2, at ch. 3.

> the deceased victim, not merely to compensatory damages awarded.

Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793 (Ct. App. 2003).

Campbell leans in this direction as well. The Court recognized that higher ratios may be required in cases in which the compensatory award may not reflect actual harm, such as "where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 582).[4] "In sum," the Court stated, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff *and* to the general damages recovered." 538 U.S. at 426 (emphasis added).

B. Given the Patchwork of Methods for Calculating Punitive Awards by the Various States, a "One-Size-Fits-All" Constitutional Cap Is Unfair and Impractical.

In *Gore*, the Court reiterated the principle that in "our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." 517 U.S. at 568. Each state has

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[4] In its discussion of the reprehensibility factor, the Court remarked that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded . . . to achieve punishment or deterrence." 538 U.S. at 419. The context plainly indicates that the Court intended to emphasize that punitive damages have no compensatory purpose, not that courts may not consider uncompensated harm under the second guidepost.

"legitimate interests in punishment and deterrence," and "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.* Given the latitude that the states enjoy, any attempt to articulate more precise criteria for constitutional excessiveness should, to the extent possible, accommodate the standards and procedures followed by the various states in assessing punitive damages. The absolute multiplier proposed by Philip Morris, however, is incompatible with approaches taken by several states in authorizing punitive damages.

In Georgia, for example, a statute caps punitive damages at $250,000 *except in products liability cases* and in cases involving a specific intent to harm. GA. CODE ANN. § 51-12-5.1. The statute expressly provides that there is no limit on the amount of punitive damages that a jury may award in a products liability case, but also provides that in such cases only one award of punitive damages may be recovered in a court in Georgia for the same act or omission regardless of the number of causes of action that arise from the act or omission. GA. CODE ANN. § 51-12-5.1(e)(1). The statute further requires that in products liability cases, seventy-five percent of any punitive damages award must be paid to the state. GA. CODE ANN. § 51-12-5.1(e)(2). "The Legislature passed the 75-percent provision to punish defendants *who have the potential to damage society at large*." *Ford v. Uniroyal Goodrich Tire Co.*, 476 S.E. 2d 565, 570 (Ga. 1996) (emphasis added). The Georgia statute is intended to "benefit[] *all Georgia citizens who risk suffering harm from the defendant's acts*." *Id.* (emphasis added). In products liability cases, Georgia has chosen to assess all appropriate punishment in the first case

brought, but prevents repetitive punishment by providing for only one punitive damages proceeding. Under this system, a strict requirement that the punitive award be proportional to the harm sustained *by the plaintiff* makes no sense. The absolute "ratio cap" advocated by Philip Morris would undermine the choices made by the Georgia Legislature in formulating its approach to punitive damages.

The constitutional approach advocated by Philip Morris would be equally unfair and unworkable in Alabama. That state allows recovery *only* of punitive damages in wrongful death cases; compensatory damages are strictly prohibited. *See, e.g., Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1218 (Ala. 1999). Although Alabama has capped punitive damages in other types of cases, it expressly exempts wrongful death cases from the cap. ALA. CODE § 6-11-21(j). As the Alabama Supreme Court explained, "The Legislature has obviously decided that an arbitrary cap cannot be placed on the value of human life." *Killough v. Jahandarfard*, 578 So. 2d 1041, 1044 (Ala. 1991). Because Alabama's system of redressing wrongful deaths does not allow consideration of compensatory damages, the multiplier cap that Philip Morris advocates would not work in Alabama. *See Ramanauskas*, 731 So. 2d at 1218 (Ala. 1999) (noting that because "Alabama law does not allow the recovery of compensatory damages in a wrongful-death case," the "ratio" factor for determining excessiveness identified in *Gore* "is not applicable.").

Application of the proposed constitutional ratio cap would thus directly conflict with, and undermine the policy interests served by, the approaches to punitive damages followed by Georgia and Alabama. The proposed cap would also conflict in less dramatic, but equally

important, ways with methods adopted by other states. Four states – Alaska, Kansas, Mississippi, and Montana – have enacted legislation that effectively caps punitive damages in products liability cases by a percentage of the defendant's net worth or by a multiple of the profits gained from the wrongful conduct, subject to an absolute (but large) monetary cap on the award.[5] These systems prioritize the deterrent effect of punitive damages over the sense of proportion afforded by a ratio. Application of a constitutionally mandated maximum ratio *in addition* to this other way of controlling punitive awards would needlessly interfere with the policy choices made by these states. At least eight other states limit punitive damages to *the greater* of a multiple of the compensatory damages awarded or a specific dollar amount.[6] To impose a constitutionally

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[5] *See* ALASKA STAT. § 09.17.020 (if defendant's conduct had financial motive and defendant knew of outcome before the conduct, cap is the greater of 4 times the compensatory damages, 4 times defendant's financial gain, and $7 million); KAN. STAT. ANN. § 60-3702 (cap is lesser of defendant's highest annual gross income in past five years, 50% of defendant's net worth, and $5 million; if profit exceeds these amounts, cap is 1.5 times the profit); MISS. CODE ANN. § 11-1-65 (cap ranges from 4% of defendant's net worth if its net worth is $50 million or less to $20 million if net worth exceeds $1 billion); MONT. CODE ANN. § 27-1-220 (cap is 3% of defendant's net worth or $10 million). The substantive limitations on punitive damages in all fifty states and the District of Columbia are described, summarized, and categorized in Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, LOY. L.A. L. REV. 1297, 1338-60, 1370-1417 (2005).

[6] ARK. CODE ANN. § 16-55-208 (3 times compensatory award or $250,000, whichever is greater, up to $1 million); FLA. STAT. § 768.73 (if supervisor ratified the conduct, then 4 times compensatory award or $2 million, whichever is greater; if specific intent to harm is proved, then no cap); IDAHO CODE § 6-1604(3) (3 times compensatory award or $250,000, whichever is greater); N.J. REV. STAT. § 2A:15-5.14 (5 times compensatory award or $350,000, whichever is greater); N.C. GEN. STAT. § 1D-25 (3 times compensatory award or $250,000, whichever is

(Continued on following page)

mandated maximum ratio on punitive awards in these states, which may yield a lesser award than that authorized by state law, would similarly impinge on the states' legitimate policy choices.

"Although it might be convenient to establish a multipart test and impose it upon the states, the principles of federalism counsel against such a course." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 483 (1993) (O'Connor, J., dissenting). "The States should be permitted to 'experiment with different methods' of ferreting out impermissible awards 'and to adjust these methods over time.'" *Id.* (O'Connor, J., dissenting) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 64 (1991)). The states, including Oregon, have developed disparate but reasonable and effective methods for identifying excessive awards of punitive damages. The Court should not endorse a strict mathematical test that purports to do the same job but conflicts with the reasonable methods and policies of many states.

C. The Absolute Cap Proposed by Petitioner and Its Amici Would Diminish the Deterrent Effect of Punitive Awards.

Although this Court's recent jurisprudence recognizes a constitutional limit on the size of awards of punitive

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greater); N.D. CENT. CODE § 32-03.2-11(4) (2 times compensatory award or $250,000, whichever is greater); OKLA. STAT. tit. 23, § 9.1 (for reckless disregard, compensatory award or $100,000, whichever is greater; for intentional conduct with malice, 2 times compensatory award or $500,000, whichever is greater; for conduct that threatened a human life beyond a reasonable doubt, no cap); VA. CODE ANN. § 8.01-38.1 (no ratio; absolute cap of $350,000).

damages, nothing in the Court's decisions or in logic guarantees defendants the right to be assessed a precisely predictable award. On the contrary, courts applying state law have acknowledged that predictability tends to negate the deterrent effect of punitive damages. As the Colorado Supreme Court noted, "If punitive damages are predictably certain, they become just another item in the cost of doing business." *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Colo. 1984). "Rather than remove dangerous products from the market, manufacturers may instead accept the risk of paying limited punitive damages." *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 284 (D.N.J. 1989). "The risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition." *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 477 (N.J. 1986). Endorsement of a strict ratio as a constitutional maximum would enable defendants in products liability cases more easily to calculate the true cost of marketing dangerous products, which in turn would enable them to pass on the cost to consumers – a perverse result, as the consumers are the very persons being endangered.

Commentators have recognized that a cap on the ratio of punitive to compensatory damages "makes life easier for defendants," but does so "at the cost of the deterrent effect of punitive damages." Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 HASTINGS L.J. 1001, 1007 (1999). Because of the manufacturer's ability to pass on the costs of its products, the level of compensatory damages even in cases involving serious physical injuries "may be too low in practice to accomplish proper deterrence. Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049,

1051, 1078 (2005) (quoting Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 941-42 (1998)). Professor Chemerinsky thus urges that the ratio factor "simply be eliminated in evaluating whether a punitive damages award is grossly excessive." *Id.* At a minimum, a specific ratio should not be adopted as a constitutional standard.

II. The Due Process Clause Does Not Prohibit a Jury from Considering All of the Effects of the Defendant's Misconduct Within the State in Calculating an Award of Punitive Damages.

A. An Absolute Prohibition on Relating a Punitive Award to the Entire Scope of the Defendant's Misconduct Within the State Would Conflict with the Methods and Policies of Many States.

The Oregon statute governing punitive damages in products liability expressly authorizes the finder of fact to consider "the total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's. . . ." OR. REV. STAT. § 30.925(2)(g). The statute assumes that the factfinder will base the punitive award on the amount necessary to punish the defendant for harm inflicted not just on the plaintiff, but on others in the state; otherwise there would be no need to consider the mitigating effect of punitive awards to other plaintiffs. Philip Morris and its amici attempt to portray Oregon's statewide approach as an aberration. Pet. Br. 17-21; Br. for Amici Curiae R. J. Reynolds Tobacco Co., et al., 20-27. Even if this were true, "novelty itself is not a vice." *Chandler v. Miller*, 520 U.S.

305, 324 (1997) (Rehnquist, C.J., dissenting). It is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* (quoting *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

But Oregon's approach is not aberrational or novel. Other states allow factfinders to focus not on the defendant's direct relationship with the plaintiff, but on the defendant's conduct and state of mind in committing the acts that injured the plaintiff, in calculating the appropriate punitive damages award.

As described above, Georgia contemplates that plaintiffs in products liability cases will collect "statewide" punitive damages for harm caused in the state by the defendant's dangerous products, as it expressly provides for unlimited punitive damages while restricting the defendant's liability to one award. GA. CODE ANN. § 51-12-5.1(e)(1); *Mack Trucks, Inc. v. Conkle*, 436 S.E. 2d 635, 639 (Ga. 1993) ("It can be seen that subsections (e), (f) and (g) constitute a consistent statutory scheme for the regulation of punitive damages. . . . Because of the potential ability to damage numerous citizens, the defendant may be punished by the imposition of unlimited damages, but this may occur only one time."). In Missouri, a statute provides that a defendant found liable for punitive damages may move the trial court for a credit in the amount of punitive damages that the defendant previously paid for the same course of conduct. MO. REV. STAT. § 510.263(4). As in Georgia, this approach presupposes that the punitive award is intended to punish for *all* harm caused by the defendant in the state, not just the harm inflicted on the

plaintiff. Similarly, in Montana, a statute requires that punitive damages be assessed in a separate proceeding at which "previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act" is considered." MONT. CODE ANN. § 27-1-221(7). Florida and Ohio have recently enacted legislation protecting defendants from awards of punitive damages if a punitive award had previously been assessed against the defendant for the same course of conduct. FLA. STAT. § 768.73(2)(b); OHIO REV. CODE ANN. § 2315.21(D)(5).

There is – and should be – room in the federalist system for the approach to punitive damages taken by these states. It is reasonable for a state to conclude, as did Oregon, Georgia, and the other states identified above, that "society's interest [is] better served by deterring objectionable conduct at the first opportunity so that the potentially greater injury which might otherwise be caused by such conduct might be avoided." *Hosp. Auth. of Gwinnett County v. Jones*, 409 S.E. 2d 501, 503 (Ga. 1991). The punitive awards authorized by these systems, and the award approved by the Oregon Supreme Court in this case, are sensible and effective in light of the egregiousness of the conduct involved, the nature and amount of the harm inflicted, and the need for punishment that fits the offender as well as the offense. The Court should not interpret the Due Process Clause to prohibit this reasonable approach to the assessment of punitive damages.

B. The Proposed Constitutional Requirement That a Punitive Damages Award Relate Only to the Harm Suffered by the Plaintiff Would Insure That the Defendant Will Escape Appropriate Punishment for Its Reprehensible Conduct.

Philip Morris argues that the trial judge's refusal to instruct the jury that it may not assess punitive damages for harm suffered by persons other than the plaintiff violated the Due Process Clause because it effectively deprived Philip Morris of the opportunity to show that it was not legally liable to those other Oregonians and because it subjected Philip Morris to an inappropriate risk it will be assessed additional punishment for the same conduct. Neither of these arguments withstands analysis. They surely provide no basis for this Court to enshrine Philip Morris' proposed instruction as a constitutional requirement.

First, as this Court has repeatedly recognized, the primary reference point in calculating an appropriate punitive award is not the amount of damage caused by the defendant – even to the plaintiff – but the reprehensibility of the defendant's conduct. *See Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 575. One measure of reprehensibility, in turn, is the number of persons that were, or *could have been*, hurt by the defendant's actions. *Campbell*, 538 U.S. at 424-25 (refusing to specify the maximum constitutionally-permissible ratio, "even one that compares actual *and potential* damages to the punitive award") (emphasis in original). Thus, whether or not Philip Morris has been or could be held *legally responsible* for the injuries of other smokers is unimportant. The key fact is that Philip Morris acted with intent to injure those other persons. The

number of those potential victims is certainly fair to consider in calculating the appropriate punishment.

Second, Philip Morris' brief description of its litigation history demonstrates that it is not just reasonable but necessary for the jury to consider the harm to others in assessing punitive damages. Philip Morris notes that in the 50-year history of tobacco litigation, only two cases have gone to trial in Oregon. Pet. Br. 13. It points out that it has prevailed in a "significant majority" of the individual tobacco cases brought to trial, and notes that its "winning defenses" include lack of reliance, failure to prove proximate causation, and the statute of limitations, among others. Pet Br. 14 & n.4. None of these defenses relate to the allegation that Philip Morris fraudulently marketed its tobacco products, and Philip Morris' track record in litigation means only that it is *not* being punished for conduct that this jury found reprehensible. And Philip Morris cannot colorably maintain that its success in the courtroom indicates that it did not injure thousands of consumers in Oregon and millions across the country. As Judge Gladys Kessler recently held, Philip Morris is one of a number of tobacco companies that "survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system." *United States v. Philip Morris USA, Inc.*, ___ F. Supp. ___, 2006 WL 2380622, at *2 (D.D.C. Aug. 17, 2006). These companies, Judge Kessler continued, "marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted." *Id.* For Philip Morris to

suggest that it may not really be responsible for a widespread health tragedy in Oregon is black humor, and the company's uncanny ability to prevail on plaintiff-specific and even technical defenses does not mean that it should escape punishment for engaging in reprehensible conduct that inevitably injured thousands of consumers in Oregon. *See Gavin v. AT&T Corp.*, ___ F.3d ___, 2006 WL 2548238, at *6 (7th Cir. Sept. 6, 2006) (per Posner, J.) (recognizing that a higher ratio of punitive to compensatory damages is permitted "if there are multiple victims and an indication that the tortfeasor has been eluding liability successfully").

This Court has observed that the constitutional ceiling on a punitive damages award is higher in cases in which "the injury is hard to detect." *Campbell*, 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 581). In such cases, the plaintiff's ability to recover compensation is limited by practical difficulties unrelated to the reprehensibility of the defendant's conduct and does not provide a reasonable basis for measuring the amount of punitive damages appropriate for punishment and deterrence. Similarly, scholars have recognized that "injurers will sometimes be able to escape liability for harms for which they should be held responsible," for reasons such as difficulty in establishing causation, inability to identify the tortfeasor, or the victims' aversion to the legal process. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 888 (1998). They argue that punishment in such difficult cases "should be raised sufficiently so that injurers' average damages will equal the harm they cause." *Id.* at 889. As another commentator has explained, "extra-compensatory damages serve to supplement compensatory damages in such a manner that a

rational actor with awareness of under-enforcement problems would nonetheless consider the externalized costs of its actions, because the prospect of extra-compensatory damages for torts that have actually been detected in effect warrant doing so." Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 122 (2005).

Although it is doubtful that punitive damages ultimately recovered by plaintiffs in Oregon will ever "equal the harm [Philip Morris] cause[d]" in the state, it is a certainty that they will never reach that level if juries must confine their attention to the harm done by Philip Morris to the individual plaintiff. The rule sought by Philip Morris is intended to guarantee that bad actors in mass injury cases never receive punishment commensurate with the harm that they have caused. The rule should not be embraced by the Court.

C. Procedures Already in Place Adequately Protect Philip Morris Against the Risk That It Will Incur Multiple Punishment for the Same Offense.

Philip Morris and its amici point out that Oregon's method of assessing punitive damages creates a risk that Philip Morris will incur other punitive awards for the same conduct, because other Oregonians remain free to sue Philip Morris for the same harm. Pet. Br. 11-12; Br. of the Chamber of Commerce of the United States of America 11-14. Oregon has incorporated into its statutory approach to punitive damages two levels of protection to guard against the risk of multiple punitive awards. First, at the trial level, Oregon law provides that in awarding punitive damages the factfinder must consider, among other

factors, "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected." OR. REV. STAT. § 30.925(2)(g). Other states similarly allow defendants to offer evidence that they have previously paid punitive damages for the same course of conduct in defense or mitigation of a punitive damages claim. *See, e.g.*, MO. REV. STAT. § 510.263(4); MONT. CODE ANN. § 27-1-221(7); FLA. STAT. § 768.73(2)(b); OHIO REV. CODE ANN. § 2315.21(D)(5); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W. 2d 35, 42 (Tex. 1998) (evidence of prior payments of punitive damages is admissible in mitigation of a punitive damages claim); *id.* at 48-53 (finding that the Due Process Clause protects defendants from punitive awards based on the same course of conduct which are excessive in the aggregate).

The Chamber of Commerce argues that the type of protection offered by this statute is "no comfort to defendants," because it places the defendant "in the untenable position of arguing that it should not be liable or punished for alleged wrongdoing while simultaneously introducing evidence that the same conduct caused a prior jury to award large punitive damages." Br. Chamber 11. It is not the job of the Due Process Clause to protect defendants from difficult strategic choices. *See McKune v. Lile*, 536 U.S. 24, 41 (2002) (the "criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses,

the Constitution does not by that token always forbid requiring him to choose.") (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)).

But to provide defendants further "comfort" in defending against repetitive punitive awards, the Oregon system provides a second level of protection, this one at the judicial review stage. Oregon law provides that a defendant may file a post-trial motion to reduce the punitive award based on a showing that "the defendant has taken remedial measures that are reasonable under the circumstances to prevent reoccurrence of the conduct that gave rise to the claim for punitive damages." OR. REV. STAT. § 31.730(3). The statute specifically provides that deciding such a motion "*shall consider* the amount of any previous judgment for punitive damages entered against the same defendant for the same conduct giving rise to a claim for punitive damages." *Id.* (emphasis added). Thus, Oregon law provides the defendant with an opportunity to offer its arguments that it has been sufficiently punished by prior awards free from the risk that the initial factfinder will interpret this evidence in mitigation as an indication of liability. These provisions of Oregon law more than adequately protect defendants from the risk of redundant punitive damages awards.

CONCLUSION

The judgment of the Supreme Court of Oregon should be affirmed.

Respectfully submitted,

GERSON H. SMOGER
Counsel of Record
SMOGER & ASSOCIATES
3175 Monterey Boulevard
Oakland, California 94602
(510) 531-4529

BRENT M. ROSENTHAL
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, Texas 75214
(214) 521-3605

Attorneys for Amicus Curiae Association of Trial Lawyers of America

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA Inc.,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE CAMPAIGN FOR TOBACCO-FREE KIDS, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN COLLEGE OF CHEST PHYSICIANS, AMERICAN COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE, AMERICAN ASSOCIATION FOR RESPIRATORY CARE, AMERICAN DENTAL HYGIENISTS' ASSOCIATION, AMERICAN LEGACY FOUNDATION, AMERICAN LUNG ASSOCIATION, AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN SOCIETY OF ADDICTION MEDICINE, AMERICAN THORACIC SOCIETY, LUNG CANCER ALLIANCE, NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH, NATIONAL RESEARCH CENTER FOR WOMEN AND FAMILIES, NATIONAL LATINO COUNCIL ON ALCOHOL AND TOBACCO, AND SOCIETY FOR RESEARCH ON NICOTINE AND TOBACCO, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

WILLIAM B. SCHULTZ *
ANDREW N. GOLDFARB
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-1800

* Counsel of Record

Attorneys for Amici Curiae

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INTERESTS OF AMICI CURIAE[1]

Amici are non-profit, public health organizations and professional medical societies that for decades have worked to address the devastating health and economic consequences of tobacco use in the United States. As an important part of that mission, *amici* have worked to counter the decades-long campaign of fraudulent public statements perpetrated on the American public by petitioner Philip Morris USA Inc.

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[1] By way of blanket consents filed with the Clerk of this Court, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. No person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

("Philip Morris") and other major tobacco companies about the adverse health effects and addictiveness of smoking. Hence, *amici* are qualified to evaluate the reprehensibility of Philip Morris's conduct at issue in this case, which is the issue that they will address in this *amicus* brief.

The interests of *amici* are more fully set out in Appendix A.

SUMMARY OF ARGUMENT

This Court has repeatedly affirmed that the reprehensibility of a defendant's conduct is the most important consideration in assessing the reasonableness of a punitive damage award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). Under the factors that the Court has directed courts to use in evaluating the reprehensibility of a defendant's conduct, the evidence in this case describes a 45-year history of intentional wrongdoing by petitioner Philip Morris that is reprehensible to an extraordinary degree. Philip Morris engaged in this course of conduct with utter and reckless disregard for the health and safety of consumers. The scope and nature of physical harm that resulted from that total indifference for smokers' health is profound. All told, tobacco use causes an estimated 400,000 deaths annually in the United States, and is responsible, *inter alia*, for one in three deaths from cancer and one of every five deaths from heart disease.

From the publication of the "Frank Statement to Cigarette Smokers" in 448 newspapers nationwide in 1954, through Jesse Williams' death in 1997, through the jury verdict in this case in 1999, Philip Morris engaged in a multi-faceted campaign of deception. Philip Morris made false and misleading public statements about the health effects of

smoking; about what Philip Morris was doing to discover any adverse effects; about whether smoking is addictive and the role of nicotine in that addiction; and about its ability to control the delivery of nicotine to the smoker.

For decades, Philip Morris knew that most smokers start smoking before age 18 and acknowledged internally that cigarette smoking causes disease and death. Yet Philip Morris nevertheless marketed its cigarettes, especially its flagship Marlboro brand, to appeal to underage smokers, and designed them to ensure sufficient nicotine delivery to create and sustain nicotine addiction. While that strategy created millions of lifetime Philip Morris customers, made Marlboro the best-selling cigarette brand, and made Philip Morris the dominant cigarette company in the United States, it has caused enormous physical harm, suffering, and death. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States.").

At the time of the jury verdict in this case, Philip Morris had not yet publicly admitted what it acknowledged internally for more than 40 years – that smoking is a cause of disease; that smoking is an addiction primarily caused by the drug nicotine; and that Philip Morris developed and exploited the ability to control the amount and form of nicotine delivered by cigarettes.

During the second half of the Twentieth Century, Philip Morris zealously sought to preserve the market for cigarettes, maximize its profits, protect its litigation interests, and avoid meaningful product regulation. Because telling the truth to its customers and the public was an impediment to these goals, Philip Morris intentionally abandoned the truth. Instead, Philip Morris aimed its fraudulent public statements at every corner of the United States. Consistent with the

jury's finding in this case, Philip Morris's fraud has contributed substantially to the catastrophic health effects of smoking. *Amici* are many of the nation's leading tobacco control advocates, volunteer health agencies, independent tobacco research organizations, and health provider groups. These organizations and their members have been front-row witnesses to Philip Morris's conduct and first-line responders to its public health consequences in the State of Oregon and throughout the United States.

Amici have confined their submission to the reprehensibility of Philip Morris's conduct at issue here, and respectfully submit that the egregious nature of that conduct supports the decision below. The punitive damages awarded by the Oregon jury against Philip Morris in this case should be upheld.

ARGUMENT

Jesse Williams was a longtime smoker of Philip Morris's Marlboro brand of cigarettes. After he died of lung cancer in 1997, his estate brought suit in Oregon state court against Philip Morris, claiming fraud and negligence. After a trial in 1999, the jury found for the plaintiff and awarded $821,485 in compensatory damages and $79.5 million in punitive damages.

Philip Morris challenges the punitive damage award as a violation of due process under the legal parameters set forth in *State Farm*. In *State Farm*, the Court held that whether a punitive damage award is so excessive as to be unconstitutional depends upon (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm to the plaintiff and the punitive damages award; and (3) the difference between the punitive damage award at issue and the penalties

authorized or imposed in comparable cases. 538 U.S. at 418. As stated above, this brief addresses only the first *State Farm* guidepost – the reprehensibility of Philip Morris's conduct.

THE EXTRAORDINARILY REPREHENSIBLE NATURE OF PHILIP MORRIS'S CONDUCT SUPPORTS THE PUNITIVE DAMAGE AWARD BELOW.

This Court has repeatedly affirmed that reprehensibility of a defendant's conduct is the most important consideration in assessing the reasonableness of a punitive damage award. *State Farm*, 538 U.S. at 419; *Gore*, 517 U.S. at 575. In *State Farm*, the Court identified five factors for courts to consider in determining the reprehensibility of a defendant's conduct. According to the Court, reviewing courts must consider whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 576-77). As we demonstrate below, when considered in light of these measures of reprehensibility, Philip Morris's conduct spanning five decades was extraordinarily egregious.[2]

---

[2] Only the "financial vulnerability" factor is not at issue in this case.

In Section A below, *amici* demonstrate that Philip Morris's conduct in this case meets the fourth and fifth *State Farm* guideposts of reprehensibility. Philip Morris's conduct involved repeated actions and caused harm that was the result of intentional malice and deceit. The company pursued a campaign of fraud over 45 years to mislead and to deceive the American public, including Jesse Williams, in two broad ways. First, since 1954, forward Philip Morris – both independently and in concert with other tobacco companies – has issued false public statements about whether smoking causes cancer and other disease, about its commitment to protect the health of its customers, and about its commitment to uncover any adverse health effects of smoking. Second, for decades Philip Morris – both independently and through representatives – publicly denied the addictiveness of smoking and of the nicotine delivered by cigarettes, concealing from the public its knowledge of nicotine's addictive properties and its extensive efforts to exploit those properties to keep people smoking.

In Section B, *amici* show that Philip Morris's conduct in this case also meets the first two measures of reprehensibility identified in *State Farm*. The injury caused by Philip Morris's conduct was physical, and Philip Morris exhibited profound and total indifference to the health and safety of others.

In short, the evidence in this case demonstrates that Philip Morris's campaign of deceit was "*especially* [and] *unusually* reprehensible." *See Gore*, 517 U.S. at 590 (Breyer, J., concurring).

A. PHILIP MORRIS PURSUED AN INTENTIONAL CAMPAIGN OF FRAUD AND DECEIT RELATING TO THE HEALTH EFFECTS OF SMOKING AND THE ADDICTIVENESS OF SMOKING FOR NEARLY 50 YEARS.

The evidence of Philip Morris's decades-long campaign of fraud confirms the scope of its misleading and deceitful conduct, and that it was undertaken purposefully to preserve Philip Morris's extraordinary profits. Internal documents and witness testimony in the record in this case show that Philip Morris's entire business was predicated on its commitment to get the Jesse Williamses of the world to become and stay addicted to smoking Philip Morris's cigarettes. Philip Morris and its agents deceived and misled the public, *inter alia*, about the health effects of smoking, the addictiveness of smoking and the role of nicotine in that addiction. Contrary to its public statements, Philip Morris designed its cigarettes to ensure that its products delivered enough nicotine to create and sustain addiction across the broadest possible range of smokers.[3]

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[3] A federal district court recently reached similar conclusions in an exhaustive, 1,683-page memorandum opinion, holding Philip Morris and other major tobacco companies liable for a far-ranging scheme to defraud under the federal racketeering laws. *United States v. Philip Morris USA Inc., et al.*, Civ. No. 99-2496 (GK), 2006 WL 2380622 (D.D.C. Aug. 17, 2006) (part 1 of 6) (full mem. op. available in pdf format at www.dcd.uscourts.gov).

1. Philip Morris's Statements Made During the Second Half of the Twentieth Century Denying That Smoking Was a Proven Cause of Disease Were Fraudulent.

Jesse Williams began smoking in about 1950, just at a time when early epidemiological studies linking smoking to disease began to emerge. To keep people like Jesse Williams smoking, Philip Morris, along with the other leading tobacco companies at the time, committed to undertake a "long-term" campaign that was "entirely 'pro-cigarettes'" to promote cigarettes and to defend them against the mounting evidence of their harms "and other attacks that may be expected in the future." Plaintiff's Exhibit 1 (hereafter "Pl. Exh. __"). Accordingly, in January 1954, Philip Morris, in conjunction with other tobacco companies, issued the "Frank Statement to Cigarette Smokers" in 448 newspapers around the country, including in Oregon. In the Frank Statement, Philip Morris stated, *inter alia*:

> -- "Distinguished authorities point out: . . . [t]hat there is no proof that smoking is one of the causes [of lung cancer]."
>
> -- "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."
>
> -- "We always have and always will cooperate closely with those whose task it is to safeguard the public health."
>
> -- "We are pledging aid and assistance to the research effort into all phases of tobacco use and health. . . . For this purpose we are

> establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE."

J.A. 202a-204a (Pl. Exh. 5). Philip Morris executives made similar public statements elsewhere over the years. *See id.* at 205a (Pl. Exh. 10; March 1954 statement in news service quoting Philip Morris Vice President that if Philip Morris had any thought or knowledge that cigarettes were harmful, "we would stop business tomorrow."); *id.* at 208a-210a (excerpt from Philip Morris's Second Request for Admissions).

The Frank Statement set forth the core themes for the fraudulent public relations campaign that Philip Morris, along with other tobacco companies, pursued for the next four decades – denying that smoking was a proven cause of disease, feigning a commitment to protecting the health of smokers, and touting its support for research that it claimed was intended to uncover the truth. As the evidence in this case demonstrates, each of these statements was knowingly false, misleading, deceptive, or otherwise fraudulent when made. Significantly, the statement that there was "no proof" that smoking was a cause of lung cancer was untrue. In fact, there was a growing body of credible scientific and medical evidence – pathological, clinical, chemical, and epidemiological – of the toxicity of cigarette smoke and smoking's role in causing lung cancer. *See, e.g.*, Pl. Exh. 12 (March 31, 1954 Memo from Philip Morris scientist to executive George Weissman that "several important, serious-minded . . . scientists have stated publicly that there is something harmful in tobacco smoke. I too can name several harmful ingredients. . . ."); *see also* Transcript Volume 11-A at 56 (testimony of Elizabeth Whelan, Ph.D.) (discussing retrospective studies of early 1950s); *id.* at 57-58 (discussing animal experiments of 1953); *id.* at 68-73 (explaining false

and deceptive nature of statements in the Frank Statement) (hereafter "Tr. Vol. __").

The egregious nature of Philip Morris's conduct is further demonstrated by its role in controlling and exploiting the Tobacco Industry Research Committee ("TIRC"), the purportedly independent research body whose creation was touted in the Frank Statement. From its formation, TIRC was primarily a tool in the public relations campaign and defense of lawsuits. *See* Pl. Exh. 104 (minutes of 1978 meeting of "ad hoc" committee at which industry lawyers acknowledged role of CTR as a "shield" and "front" to serve industry interests). TIRC, later renamed the Council for Tobacco Research ("CTR"), was designed to give the tobacco industry's denial of a causal link between smoking and cancer a patina of scientific legitimacy. Tr. Vol. 11-A at 92-93 (Whelan testimony). But the Board of Directors of TIRC/CTR was comprised exclusively of tobacco industry executives, and its activities were controlled by company employees and lawyers. For the entire 45 years of its existence, CTR never wavered from the tobacco industry's consistent public position, and CTR was used by Philip Morris and the other companies to administer and support research programs designed to bolster their public denials of smoking's harms. The most far-reaching of these programs, known as "CTR Special Projects," were studies requested and monitored by industry lawyers to bolster the defense of smoking and health lawsuits. *See, e.g.*, Pl. Exh. 104 (discussing CTR "special projects"). Moreover, Philip Morris's scientists who helped oversee CTR's work kept close watch to ensure that CTR did not support research that could undermine the public positions taken by Philip Morris. For example, in 1980, Director of Research Thomas Osdene, who was in charge of keeping alive the smoking and health "controversy" (J.A. 62a-63a) and rose to Vice President of Research in his 27 years at Philip Morris, wrote a memo to Philip Morris's Vice President of Research, urging that CTR

be directed to avoid research aimed at "developing new tests for carcinogenicity" or research that would "attempt to relate human disease to smoking." Pl. Exh. 108.

In early 1958, Philip Morris and other tobacco companies formed the Tobacco Institute ("TI") to take the lead role from CTR in coordinating and bolstering the tobacco industry's public relations efforts. Pl. Exh. 30. Philip Morris's Chief Executives served on TI's Board of Directors and its Executive Committee, including as TI's Chairman, and Philip Morris's General Counsel served on the powerful Committee of Counsel. Over the years, Philip Morris executives routinely served on the various TI committees that set the course for TI's efforts to promote the industry's interests. *See, e.g.*, Pl. Exh. 54 at 6-7.

By 1958, Philip Morris scientists had acknowledged to tobacco industry colleagues that smoking was a cause of disease. That year, scientists for a British tobacco company visited the United States and found nearly uniform acceptance of the causation conclusion among scientists at American tobacco companies, including Philip Morris:

> With one exception (H.S.N. Greene) the individuals whom we met believed that smoking causes lung cancer if by "causation" we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link. In the U.S.A. only Berkson, apparently, is now prepared to doubt the statistical evidence and his reasoning is nowhere thought to be sound.
>
> * * *
>
> The majority of individuals whom we met accepted that beyond all reasonable doubt cigarette smoke most probably acts as a direct

> though very weak carcinogen on the human lung. The opinion was given that in view of its chemical composition it would indeed be surprising if cigarette smoke were not carcinogenic. . . .

Pl. Exh. 28. Consistent with that understanding, in 1961 an internal scientific presentation documented Philip Morris's awareness of many known cancer-causing compounds in cigarette smoke. Pl. Exh. 42; *see also* JA 225a-228a (Pl. Exh. 53; March 25, 1964 memo noting that "the product design should include consideration of chemical carcinogens . . . .").

In 1964, the Advisory Committee to the United States Surgeon General issued its landmark report ("1964 Report") on smoking and health. The Committee's main scientific conclusion was that smoking is a cause of lung cancer in men. In reaching that consensus judgment, the distinguished Advisory Committee applied a rigorous set of causal criteria to the voluminous body of chemical, biological, pathological, clinical, and epidemiological evidence then available. *See* Pl. Exh. 159 (1964 Report).

If its statements that it would act to protect the health of its customers had been truthful, Philip Morris would have treated the 1964 Report as a clarion call to inform its customers of the scientific and medical evidence, and to stop telling the public that smoking was not proven to be harmful. Instead, Philip Morris viewed the 1964 Report as a threat to its market and profits. As longtime executive George Weissman told Chairman Joseph Cullman III in a confidential memorandum in the wake of the 1964 Report, Philip Morris now had to offer smokers "a psychological crutch and self-rationale to continue smoking." J.A. 221a-224a at 222a (Pl. Exh. 50). Statements like Weissman's show that the Frank Statement claim that smokers' health was "paramount" to Philip Morris was flatly false. Rather, Philip Morris

repeatedly and consistently acted to protect its profits, not its consumers. In fact, Philip Morris recognized that the impact of the 1964 Report was limited. By 1965, Philip Morris expected the temporary "backlog of youth" who had refrained from smoking in 1964 to ease, causing a "healthy increase in the number of new smokers" as those youth joined in with "this year's crop of prospects." Pl. Exh. 57.

Internally at Philip Morris, it was generally agreed that smoking was harmful to health. Philip Morris scientists recognized that there was no credible evidence to counter the overwhelming scientific and medical consensus that smoking causes cancer and other diseases. In this case, William A. Farone, Ph.D., the Director of Applied Research at Philip Morris from 1977-1984, testified that during his extensive orientation to all aspects of Philip Morris's scientific and manufacturing operations, no one at Philip Morris ever told him that cigarette smoking did not cause cancer. J.A. 66a. Dr. Farone also testified that while Philip Morris's approach to creating the "so-called controversy" was to attack other researchers' scientific support for the hypothesis that smoking causes disease, "I never heard anyone at Philip Morris say that they had any evidence to refute that hypothesis." *Id. See also United States v. Philip Morris USA*, 2006 WL 2380632 at *167-68 (part 2 of 6), Mem. Op. at 291-93 (quoting testimony from Dr. Farone that there was "widespread acceptance that smoking caused disease" among scientists at Philip Morris based on the compelling epidemiological and chemical evidence, and from another longtime Philip Morris scientist that he knew smoking was dangerous years before he began at Philip Morris in 1972 and that it was "common knowledge" within Philip Morris that smoking caused cancer, emphysema, and other diseases).

In direct contrast to its understanding of smoking's adverse effects reflected in internal documents, Philip Morris continued unabated its campaign of public deception. Both

independently and through CTR and the Tobacco Institute, Philip Morris told the public, and smokers in particular, that whether smoking caused disease at all remained a genuine "open controversy," and attacked as inconclusive the growing body of evidence proving that cigarette smoking causes disease. TI used a plethora of media – including television appearances, newspaper statements, and pamphlets – to disseminate its views broadly. *See, e.g.*, Pl. Exh. 161 (1974 TI press release; 1991 TI statement in newspaper article that "we don't know" whether smoking causes disease); Tr. Vol. 8-C at 149-53 (testimony of TI Vice President Director of Communications). For example, during an interview for a television report in 1976, the Vice President of Philip Morris expressed concern not that Philip Morris cigarettes were killing smokers, but that people were making such claims against cigarettes "without adequate knowledge. There has not been the sort of research really that would permit anyone to say that" smoking kills hundreds of thousands of people annually. Pl. Exh. 158. On the same show, senior Philip Morris scientist Helmut Wakeham stated that Philip Morris would not be in business if it believed smoking caused disease. *Id.*

The evidence further shows that TI coordinated its public relations efforts for maximum impact. The tobacco industry timed some of its biggest public relations initiatives to coincide with the release of Surgeon General's reports on smoking, in order to skew the media coverage to present the industry's view alongside the Surgeon General's conclusions, and thereby blunt the effect of those reports on the public, and the smoking public in particular. *See, e.g.*, J.A. 59a-60a (testimony of Richard Pollay regarding TI's activities in advance of the release of the 1964 Report). Thus, rather than cooperating with public health authorities, as promised in the Frank Statement and in subsequent pronouncements, Philip Morris worked actively to undermine public health efforts. *See also* Pl. Exh. 104 (joint industry meeting at which Philip

Morris executive touted industry's ability to anticipate, and "react immediately" to government activity on smoking and health issues).

In 1972, a Tobacco Institute official frankly acknowledged the industry's public relations strategy in an internal memo:

> For nearly twenty years, this industry has employed a single strategy to defend itself . . . it has always been a holding strategy, consisting of creating doubt about the health charge without actually denying it, advocating the public's right to smoke without actually urging them to take up the practice . . . encouraging objective scientific research as the only way to resolve the question of health hazard.

J.A. 240a (Pl. Exh. 83). The memo noted that the strategy had been "brilliantly conceived and executed." *Id.* The memo further noted that "In the cigarette controversy, the public – especially those who are present and potential supporters (*e.g.*, tobacco state congressmen and *heavy smokers*) – must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor." *Id.* (emphasis added). This shows that heavy smokers like Jesse Williams were an intended target of Philip Morris's public denials of smoking's harms. Moreover, the evidence in this case showed that the strategy worked: Jesse Williams looked to the tobacco industry as a legitimate source of information about cigarettes and as a credible counterweight to statements by the Surgeon General and other public health officials. *Id.* at 131a-133a, 138a, 153a.

Thus, Philip Morris's conduct should not be considered less reprehensible simply because at the same time Philip Morris was bombarding the public with false statements about the health effects of smoking, reputable scientific and medical bodies were making truthful public statements. Indeed, Philip Morris's efforts were intended to undermine the force of those public health pronouncements, and evinced singular indifference to and reckless disregard of the health or safety of smokers and the public.

In sum, Philip Morris recognized the evidence-based conclusions of the Surgeon General about the health effects of smoking decades before Jesse Williams died of lung cancer from smoking Marlboro cigarettes in 1997. Yet because the truth threatened its extraordinary corporate profits, Philip Morris spent vast sums to deceive the public – supporting public relations efforts to attack the conclusions of the Surgeon General and to falsely reassure smokers that the science was unsettled. In 1997 – 34 years after the landmark 1964 Surgeon General's Report – Philip Morris was still years away from publicly acknowledging its agreement with the scientific and medical consensus. Philip Morris's sustained effort to protect its profit stream by undertaking activities that were knowingly contrary to its understanding of tobacco's harms, and adverse to the interests of public health, makes Philip Morris's conduct here extraordinarily reprehensible.

2. Philip Morris Publicly Denied That Smoking and Nicotine Are Addictive While Intentionally Exploiting Nicotine's Addictive Properties to Keep People Smoking.

The systemic and intentional nature of Philip Morris's wrongdoing is equally evident in its approach to the issue of

smoking addiction and nicotine. As with disease causation, Philip Morris publicly denied that smoking was addictive and misleadingly omitted any acknowledgement of the role of nicotine. At the same time Philip Morris was issuing these public denials, in part to avoid FDA regulation of cigarettes, within Philip Morris's walls company officials directed scientists of many stripes – chemists, biochemists, psychologists, behavioral pharmacologists – to exploit the addictive properties of nicotine. Philip Morris actively took steps to maintain the physiological addictiveness of cigarettes in order to ensure that people would keep smoking. Philip Morris did this intentionally, even though it knew that nicotine addiction would impede smokers' ability to reduce the risk of developing smoking-related diseases by quitting.

Internal documents show that by the late 1950s, Philip Morris recognized that the drug nicotine was primarily responsible for keeping people smoking. One 1959 memorandum by a Philip Morris researcher put it bluntly: "I. WHY DO PEOPLE SMOKE? A. Physiological Reasons . . . 3) *Addiction*." Pl. Exh. 36 (emphasis added).

Philip Morris's view of nicotine's central importance to smoking was reiterated throughout the 1960s. *See, e.g.*, Pl. Exh. 57; Pl. Exh. 59. An internal document drafted by high-level scientist Helmut Wakeham in 1969 recognized the accepted view at Philip Morris that nicotine played the central, pharmacological role in keeping people smoking.

> We share the conviction with others that it is the pharmacological effect of inhaled smoke which mediates the smoking habit. . . .
>
> We have then as our first premise, that the primary motivation for smoking is to obtain the pharmacological effect of nicotine.

> In the past we at R & D have said that we're not in the cigarette business, we're in the smoke business. It might be more pointed to observe that the cigarette is the vehicle of smoke, smoke is the vehicle of nicotine, and nicotine is the agent of a pleasurable body response.

J.A. 229a (Pl. Exh. 72). Also in 1969, another leading nicotine researcher at Philip Morris asked in a confidential memo, "[D]o we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous F.D.A. implications to having such a conceptualization go beyond these walls." Pl. Exh. 67. This shows that Philip Morris believed nicotine to be a drug and treated it as such. It also shows that Philip Morris's concealment of its nicotine knowledge and research was motivated in substantial part by its desire to avoid regulation by the FDA, the federal agency charged with protecting the public health through oversight of drugs and the devices that deliver them.

In a 1972 "Confidential" report, Philip Morris's leading nicotine researcher, William Dunn, summarized a CTR-sponsored conference held on the Caribbean island of St. Martin. Dunn wrote:

> The majority of the conferees would go even further and accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the argument goes, there would be no smoking. Some strong evidence can be marshalled to support this argument:
>
> 1) No one has ever become a cigarette smoker by smoking cigarettes without nicotine.

2) Most of the physiological responses to inhaled smoke have been shown to be nicotine-related.

Pl. Exh. 86. These documents show that Philip Morris fully understood the critical role of nicotine and considered it the lifeblood of the cigarette industry. As the Director of Research Osdene explained in 1980 when he listed nicotine research as a "major" R&D program, "My reason for this high priority is that I believe *the thing we sell most is nicotine*." J.A. 250a-251a (Pl. Exh. 109) (emphasis added).

As Dr. Farone, a former high-level researcher involved in cigarette design testified, at Philip Morris "*everything was focused on [] maintaining nicotine in smoke*." J.A. 67a (emphasis added). By November 1963, Philip Morris had noted that it had "the nicotine content of the cigarette under control." Pl. Exh. 46. Philip Morris's concern was to keep people addicted to smoking (J.A. 40a) – not with informing consumers about the nature of the product or relieving the nicotine addiction that caused smokers to inhale toxic smoke hundreds of times per day.

In the early 1980s, the leader of Philip Morris's active nicotine research program, William Dunn, acknowledged that the nicotine research was "a highly vexatious topic" for Philip Morris, because it was critical to the future success of the industry, yet "where our attorneys least want us to be." *Id.* at 247a (Pl. Exh. 106). Philip Morris saw the threat of product regulation by the FDA, an agency "known to have interests and powers antithetical to the interests of the industry. Any action on our part, such as research on the psychopharmacology of nicotine, which implicitly or explicitly treats nicotine as a drug could well be viewed as a tacit acknowledgement that nicotine is a drug." *Id.* Thus, if Philip Morris was "to study the drug nicotine, we must not be visible about it," and Philip Morris's lawyers would "likely

continue to insist on a clandestine effort in order to keep nicotine the drug in low profile." *Id.* at 248a-249a; *see also* Tr. Vol. 10-B at 123-24 (Farone testimony) (Philip Morris "has gone to great lengths to avoid having its product treated as a drug").

Accordingly, Philip Morris kept its extensive research program "clandestine." Philip Morris expended substantial resources studying nicotine, its chemical properties and physiological effects. Philip Morris sought to determine and deliver the "optimum" level and form of nicotine to deliver to smokers, and tested how to enhance the reinforcing properties of nicotine. The techniques that Philip Morris researched – and implemented in commercial brands, including Marlboro – included the use of chemicals in ways that Philip Morris concluded would enhance nicotine's physiological impact. Tr. Vol. 9-B at 43 (Farone testimony); Pl. Exh. 58; Pl. Exh. 142 ("Our laboratory has demonstrated that all forms of nicotine are not behaviorally or physiologically equal."). For example, in the early 1990s, Philip Morris studied nicotine's impact on brain activity, and determined that nicotine chemically treated with ammonia, a chemical base, reached the brain faster. J.A. 74a-75a (Farone testimony). One of the nicotine researchers, in a memo touting the accomplishments of the Electrophysiological Studies Research Group, wrote that the group's studies had shown "that there are optimal cigarette nicotine deliveries for producing the most favorable physiological and behavioral responses." Pl. Exh. 142. Philip Morris also explored ways to increase the nicotine content of cigarettes, as well as to increase the ratio of nicotine to tar in cigarettes beyond the ratio occurring naturally in tobacco. J.A. 214a-218a.

Indeed, Philip Morris indicated its willingness to conceal research results that showed nicotine's addictive properties. When a researcher proposed a study of nicotine withdrawal in rats, Philip Morris's Dunn stated: "If she is

able to demonstrate, as she anticipates, no withdrawal effects of nicotine, we will want to pursue this with some vigor. If, however, the results with nicotine are similar to those gotten with morphine and caffeine, we will want to bury it." *Id.* at 246a (Pl. Exh. 98).

Thus, Philip Morris knew that if its understanding and control of nicotine became known, it could be accused of affirmatively choosing to keep in its cigarettes the addictive agent responsible for causing the repeated inhalation of toxic tobacco smoke. As a Tobacco Institute memorandum acknowledged in 1980, "The entire matter of addiction is the most potent weapon a prosecuting attorney could have in a lung cancer/cigarette case. We can't defend continued smoking as 'free choice' if the person was 'addicted.'" *Id.* at 253a (Pl. Exh. 110). So Philip Morris (along with the rest of the tobacco industry) publicly denied that smoking was addictive, denied nicotine's pharmacological effects, and denied that it exercised broad control over the amount and form of nicotine delivered to smokers.

In 1988, the Surgeon General issued a report titled "The Health Consequences of Smoking: Nicotine Addiction" ("1988 Report"). Synthesizing the body of nicotine research that had been conducted in the wake of the 1964 Report, the Report affirmed the consensus view of all major scientific and medical organizations, including the American Psychiatric Association, the World Health Organization, and the National Institute on Drug Abuse, that cigarette smoking is a form of drug addiction primarily because of the dependence-producing drug nicotine. Pl. Exh. 159 (1988 Surgeon General's Report).

Consistent with the Surgeon General's core conclusions in 1988, Philip Morris had been aware for decades that the behavior is driven by the physiological need for the drug nicotine. Philip Morris was also well aware that

people who tried to stop smoking did experience significant physical withdrawal symptoms – a marker of physical dependence. For example, in March 1971, Philip Morris researchers issued a study on a quit-smoking campaign in Iowa, reporting the experiences of former smokers even months after quitting:

> This is not the happy picture painted by the Cancer Society's anti-smoking commercial which shows an exuberant couple leaping into the air and kicking their heels with joy because they have kicked the habit. A more appropriate commercial would show a restless, nervous, constipated husband bickering viciously with his bitchy wife who is nagging him about his slothful behavior and growing waistline.

Pl. Exh. 81.

Notwithstanding its decades of research and documented understanding about nicotine, Philip Morris's response to the 1988 Report was to deny that smoking is addictive and to deny that it controlled the amount of nicotine delivered by cigarettes. In 1994, when Philip Morris was trying to stave off a potential effort by FDA to regulate cigarettes, Philip Morris published a statement in the *New York Times* directed at "Smokers and Non-Smokers" titled "Facts You Should Know" that stated falsely that "Philip Morris does not 'manipulate' nicotine levels." *See* J.A. 272a (Pl. Exh. 148). The ad also stated that "Philip Morris does not believe cigarette smoking is addictive" because "[p]eople can and do quit smoking all the time." *Id.* As Philip Morris knew, the fact that people quit smoking has no bearing on whether it is addictive – an "inability to quit" using a drug is not and has never been part of any established scientific or medical definition of drug addiction. Moreover, Philip

Morris also knew that the success rate for people who try to quit smoking is appallingly low. *See, e.g.*, Pl. Exh. 144 (1992 memo to Philip Morris's CEO noting low success rate of available nicotine replacement therapies).

As the foregoing recitation of evidence shows, Philip Morris's decades-long course of fraud involved a stream of concerted, related actions, all designed to induce people to start smoking, to addict them to the nicotine in cigarettes, and to give addicted smokers a rationale to keep smoking. In so doing, Philip Morris acted with total and profound indifference to the health and safety of smokers. *See also* Sec. B, *infra*. This evidence provided further support for the extreme reprehensibility of Philip Morris's conduct.

B. PHILIP MORRIS'S CONDUCT CAUSED PHYSICAL HARM AND EVINCED EXTREME DISREGARD FOR THE HEALTH OF OTHERS.

Under *State Farm*, conduct that causes physical harm and that reflects a lack of regard for the health or safety of others is of a higher degree of reprehensibility. 538 U.S. at 419. In addition, a court may in certain circumstance consider evidence of similar wrongdoing that did not directly affect the plaintiff, because "such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 574 n.21 (citing *TXO Prod'n Corp. v. Alliance Resources Corp*, 509 U.S. 443, 462 n.28 (1993)); *State Farm*, 538 U.S. at 423 (other conduct that "replicates the prior transgressions" may be considered in assessing a punitive damage award).

In this case, Philip Morris's utter indifference and total disregard for the physical harm it knew resulted from its cigarettes – when they were used as Philip Morris intended for them to be used – is extraordinary by any measure. Moreover, the fraudulent activities that caused the harm in

this case were aimed not just at Jesse Williams, but at people throughout the United States.

Here, the evidence shows that Jesse Williams was heavily addicted to Philip Morris cigarettes. *See, e.g.*, J.A. 33a-35a (Benowitz testimony). As a result of that addiction, he first developed chronic bronchitis, and then died of lung cancer – a painful and invariably fatal disease – as a result of smoking Philip Morris's cigarettes. *Id.* at 122a-123a (testimony of primary physician diagnostician); *id.* at 141a (testimony of plaintiff concerning chronic bronchitis); *id.* at 155a-156a (testimony of oncologist).

The physical harm caused by Philip Morris's cigarettes was in no way limited to Jesse Williams. While Philip Morris filled its coffers on the sale of cigarettes to Jesse Williams and tens of millions of others, the consequences for the health of the American people were catastrophic. For at least 30 years, tobacco use has been the nation's leading, preventable cause of death.[4] Tobacco kills more than 400,000 people each year in the United States.[5] It causes nearly one out of every three deaths from cancer;[6] nearly one out of every five deaths from heart disease;[7] and

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[4] U.S. Department of Health and Human Services, *The Health Consequences of Smoking: A Report of the Surgeon General – 1975* at iii (1975), available at www.cdc.gov/tobacco/sgr/index.htm.

[5] U.S. Centers for Disease Control and Prevention, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States 1995-1999*, Morbidity and Mortality Weekly Report 51(14): 300-03 (Apr. 11, 2002).

[6] American Cancer Society, *Cancer Facts & Figures 2005* (2005), available at www.cancer.org.

[7] U.S. Department of Health and Human Services. The Health Consequences of Smoking: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease

87% of all lung cancer deaths.[8] Tobacco alone kills more people each year in the United States than AIDS, car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined.[9]

In 1965, 40.4% of adults, including over 50% of men, smoked in the United States. Pl. Exh. 159 (1989 Surgeon General's Report at 269). In 1999, the year of the trial and punitive damages award in this case, 23.5% of adults (46.5 million adults) in the United States were current smokers.[10] In Oregon in 1999, approximately 21.5% of adults smoked.[11] In that year, there were an estimated 158,900 lung cancer deaths and 171,600 new lung cancer cases in the United States. In Oregon, there were an estimated 2,100 lung cancer deaths and about 2,200 new lung cancer cases in 1999 – about six deaths and six new lung cancer cases each day.[12]

Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health (2004), available at www.cdc.gov/ tobacco/sgr/index.htm.

[8] American Cancer Society, *Cancer Facts & Figures 2005.*

[9] Lynch, B. S., and R. J. Bonnie, eds., *Growing Up Tobacco Free – Preventing Nicotine Addiction in Children and Youths, Committee on Preventing Nicotine Addiction in Children and Youths*, Division of Biobehavioral Sciences and Mental Disorders, Institute of Medicine, National Academy Press, Washington, DC, pp. 3-4 (1994), available at www.nap.edu/catalog/4757.html#toc.

[10] U.S. Centers for Disease Control and Prevention, *Cigarette Smoking among Adults – United States, 1999*, Morbidity and Mortality Weekly Report, 50(40):869-72 (Oct. 12, 2001).

[11] U.S. Centers for Disease Control and Prevention, *State-Specific Prevalence of Current Cigarette Smoking Among Adults and the Proportion of Adults Who Work in a Smoke-Free Environment – United States, 1999*, Morbidity and Mortality Weekly Report, Vol. 45(43): 978-82 (Nov. 3, 2000).

[12] American Cancer Society, *Cancer Facts & Figures 1999* (1999), available at www.cancer.org.

The numbers regarding addiction are similarly bleak. Seventy-seven to ninety-two percent of smokers satisfy established criteria for addiction.[13] Each year, about 30% of smokers make a serious attempt to quit smoking, and only about 3% succeed in remaining abstinent one year later, an abysmally low figure. *See* Tr. Vol. 4-B at 115 (testimony of Neal Benowitz, M.D.).[14] Most smokers attempt to quit smoking 3-5 times before succeeding. J.A. 32a (Benowitz testimony).

Philip Morris's indifference to the health and safety of smokers extended well beyond Jesse Williams. Documents in the court record in this case show that time and time again, Philip Morris chose to continue its campaign of concealment and deceit rather than publicly acknowledge the harm caused by its products and to take steps to protect the public health.

As noted above, in 1964 Philip Morris executives discussed the need to offer smokers "a psychological crutch and self-rationale to continue smoking" in the wake of the Surgeon General's Report. J.A. 222a. In 1978, Philip Morris's Director of Research Tom Osdene opposed the Tobacco Institute's commissioning a study regarding "excessive behaviors" because of the threat that the study "could alienate certain segments of the smoking population and *in today's climate we need to keep all the dedicated smokers we can.*" Pl. Exh. 102 (emphasis added). In addition, Osdene was concerned that "an admission by the industry that excessive smoking is bad for you is tantamount

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[13] Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44619, 44833-34 (Aug. 28, 1996).

[14] *See also* U.S. Centers for Disease Control and Prevention, *Smoking Cessation During Previous Year Among Adults – United States, 1990 and 1991*, Morbidity and Mortality Weekly Report, 42(26):504-507 (July 9, 1993).

to an admission of guilt with regard to the lung cancer problem. This could open the door to legal suits in which the industry would have no defense." *Id.* The next year, Osdene criticized CTR projects that he considered too closely grounded in the view that smoking was a cause of disease, and that suggested nicotine was similar to other addictive drugs: "[W]e are in the process of digging our own grave. . . . I am very much afraid that the direction of the work being taken by CTR is totally detrimental to our position and undermines the posture we have taken to outsiders." Pl. Exh. 100. And in 1982, another longtime scientist commented that the ability of Philip Morris to "survive as a viable commercial enterprise" was threatened – not because its products addict and kill its users, but because it had no effective substantive response to the scientific conclusions about smoking's harms, and public health officials might gain the regulatory authority to examine cigarettes. Pl. Exh. 122.

Not only did Philip Morris deceive the American public about the addictive nature of nicotine (*see* Sec. A.2., *supra),* documents introduced into evidence in this case demonstrate that Philip Morris recognized that its ability to deliver sufficient nicotine to sustain smokers' addiction was critical to the company's continued economic well-being – even if those profits came at the expense of its customers' health. In 1983, research directors for several tobacco companies, including Philip Morris, met to discuss how to respond to a request for assistance on nicotine research from a public health research body, the Independent Scientific Committee on Smoking and Health ("ISC"). The researchers chose to stonewall the ISC rather than risk revealing their extensive understanding of nicotine: "[O]ur response to the ISC should be that we have nothing to offer [and] we have no idea as to a worthwhile research programme." The participants agreed that research on "the role of nicotine . . . in perpetuating the smoking habit" was a "particularly sensitive area for the industry" because

> [i]f any future study showed that nicotine either was, or was not associated with perpetuating the smoking habit, industry could well be called upon to reduce or eliminate nicotine from the product. (A heads we lose, tails we cannot win situation!). *We must not become involved in any collaborative study with the ISC.*

Pl. Exh. 124 (emphasis added). This document is yet another indication that Philip Morris's public promises to cooperate with public health officials on smoking and health matters were directly contrary to its approach in practice.

Philip Morris's understanding of the critical role of nicotine, and its singular focus on expanding its market share and protecting its extraordinary profits, also influenced its cigarette design activities. Jesse Williams' widow testified that, in an effort to reduce his smoking, Williams tried smoking Marlboro Light cigarettes. J.A. 135a. These are cigarettes that Philip Morris promoted as "light," allegedly because they registered lower levels of tar and nicotine on a standardized machine smoking test that the Federal Trade Commission ("FTC") mandated in the mid-1960s. As part of this "FTC Test," the smoking machine took a standard size puff at regular intervals, drawing smoke from the end of the cigarette through a pad. *Id.* at 41a-42a. The reported FTC tar and nicotine levels were calculated by analyzing and measuring the amount of residue that collected on the pad.

As Dr. Farone testified, Philip Morris knew that humans do not smoke like machines, because their smoking behavior is influenced by their need for nicotine. *Id.* at 71a. In fact, Philip Morris developed for internal testing purposes a machine whose puffing behavior was calibrated by measurements of human smokers. The machine, known as the "human smoking simulator," was intended to replicate

actual human smoking behavior – unlike the FTC Test. *Id.* This shows Philip Morris's awareness that the FTC tar and nicotine ratings bore little relation to the tar and nicotine yields actually received by smokers. Tr. Vol. 9-B at 28 (Farone testimony). Dr. Benowitz, one of the world's leading nicotine experts, testified about design features – such as ventilation holes placed on the filter and fast-burning cigarette paper – that exploited the FTC testing protocol by reducing the amount of smoke that travels through the collection pad, so that such cigarettes register lower tar and nicotine yields on the machine. J.A. 42a-43a.

Philip Morris saw the threat to its business if it made its "light" or "low tar" cigarettes to actually deliver low levels of nicotine. To avoid that threat, these cigarettes were intentionally designed to allow addicted smokers to easily obtain far greater amounts of nicotine than registered via the FTC test. J.A. 71a. Thus, smokers (like Jesse Williams) who tried a Marlboro Light because it was promoted as lower in tar could, though modest changes in smoking behavior, get the amount of nicotine they needed to sustain their addiction. And in so doing, these smokers got essentially the same amount of tar and other toxic substances as from brands with higher yields on the FTC Test. Tr. Vol. 4-B at 66-69 (Benowitz testimony).

Finally, the more than 70% of smokers who want to quit smoking have been adversely affected by Philip Morris's concealment of internal information about nicotine in another way. By concealing its research and conclusions regarding cigarette design and nicotine – notwithstanding its oft-renewed public promise to cooperate closely with "those whose task it is to safeguard the public health" – Philip Morris forestalled FDA regulation over cigarettes. To this day, there is no meaningful regulation of cigarettes.

As the foregoing review of certain of the record evidence in this case demonstrates, Philip Morris's tortious wrongdoing lies at the extreme end of any reasonable measure of reprehensibility. The nature, duration, scope, and impact of Philip Morris's actions differ in sheer magnitude from the failure to disclose the repainting of a car that the Court considered in *Gore*, or the bad-faith actions by an insurance company addressed in *State Farm*. Over the course of nearly a half-century, Philip Morris has taken conscious steps to optimize the addictive nature of its cigarettes, even though it has long known that its cigarettes cause lung cancer, emphysema, heart disease, and numerous other diseases. Rather than disclose to smokers and potential smokers its knowledge about the harm and addiction caused by its product, Philip Morris lied. Philip Morris's cigarettes have caused death, disease, and suffering for millions of Americans. Philip Morris's conduct at issue in this case warrants special condemnation. The punitive damages verdict against Philip Morris issued by the Oregon jury and upheld by the Oregon courts should stand.

CONCLUSION

For the foregoing reasons, and those presented by Respondent, the decision below should be affirmed.

Respectfully submitted,

WILLIAM B. SCHULTZ
(Counsel of Record)
ANDREW N. GOLDFARB
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-1800
Attorneys for Amici Curiae

APPENDIX

APPENDIX A

INTERESTS OF AMICI CURIAE

Amicus Curiae the Campaign for Tobacco-Free Kids works to raise awareness that cigarette smoking is a public health hazard by advocating public policies to limit the marketing and sales of tobacco to children, and altering the environment in which tobacco use and policy decisions are made. Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use of tobacco products.

Amicus Curiae the American Cancer Society, Inc. ("ACS") has over three million volunteers nationwide, including 50,000 physicians. The organization's mission is to eliminate cancer as a major health problem by preventing cancer, saving lives and diminishing suffering from cancer, through research, education, advocacy, and service. The organization was founded in 1913, and since that time has conducted groundbreaking research in identifying the use of tobacco products as a major cause of cancer, and educating the public about its deadly effects.

Amicus Curiae American Heart Association ("AHA") is a voluntary health organization founded in 1924 to reduce death and disability from cardiovascular diseases and stroke, which are the #1 and #3 largest killers of Americans. AHA is one of the world's premier health organizations, with 22.5 million volunteers and supporters in nearly 2,000 community organizations in the 50 states as well as in Washington, D.C., and Puerto Rico. The association invested more than $473.5 million in fiscal year 2004-05 for research, professional and public education, community service and advocacy so people across America can live stronger, longer lives. AHA has long

been active before Congress and regulatory agencies on tobacco and other health-related matters.

Amicus Curiae the American College of Chest Physicians ("ACCP"), founded in 1935, is an international medical society dedicated to providing postgraduate medical education for physicians, surgeons, and allied health professionals involved in the diagnosis and treatment of chest diseases. ACCP, and the more than sixteen thousand health care professionals it represents, help promote the prevention and treatment of diseases of the chest through leadership, education, research, and communication. ACCP publishes CHEST, a leading scientific journal featuring clinical research in pulmonary, critical care, sleep, and chest medicine disciplines. ACCP also advocates before government agencies and the courts, offering expert opinion on issues impacting cardiopulmonary health, including the effects of tobacco use, as our members see hundreds of thousands of death each year cause by tobacco usage.

Amicus Curiae the American College of Occupational and Environmental Medicine ("ACOEM"), based in Arlington Heights, Illinois, represents more than 6,000 physicians and other health care professionals specializing in the field of occupational and environmental medicine. Founded in 1916, ACOEM is the nation's largest medical society dedicated to promoting the health of workers through preventive medicine, clinical care, research, and education. ACOEM has been a strong advocate of policies and efforts that protect against exposure to environmental tobacco smoke in the workplace and elsewhere.

Amicus Curiae the American Association for Respiratory Care ("AARC") is a professional association with 40,000 members worldwide. The Association's primary membership consists of respiratory therapists, but also physicians, nurses, and other health care providers around the

world. AARC's members can be found in all areas of health care, working directly with patients to deliver life-saving and life-enhancing respiratory care.

Amicus Curiae the American Dental Hygienists' Association ("ADHA") is the largest national organization representing the professional interests of the nation's 120,000 dental hygienists. Dental hygienists are licensed health professionals dedicated to improving access to oral health care services. ADHA has long been active on tobacco control issues because regulation of tobacco products will help to prevent tobacco addiction and resulting morbidity and mortality. ADHA is the recipient of a grant from the Robert Wood Johnson Foundation's Smoking Cessation Leadership Center to launch a national campaign to promote smoking cessation.

Amicus Curiae the American Legacy Foundation is dedicated to building a world where young people reject tobacco and anyone can quit. The foundation was established in March 1999 as a result of the Master Settlement Agreement reached between the attorneys general in 46 states and five U.S. territories and the tobacco industry. The foundation develops programs that address the health effects of tobacco use through grants, technical assistance and training, youth activism, strategic partnerships, counter-marketing and grass roots marketing campaigns, research, public relations and outreach to populations disproportionately affected by the toll of tobacco.

Amicus Curiae the American Lung Association ("ALA") is one of the nation's oldest voluntary health organization, with volunteers and affiliates in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. ALA has nearly 400,000 volunteers. Since cigarette smoking is a major cause of chronic obstructive lung disease, ALA has long been active in research, education and public policy

advocacy on the adverse health effects of tobacco products. ALA has advocated for the regulation of tobacco products for more than two decades.

Amicus Curiae the American Public Health Association ("APHA") was founded in 1872 and is the oldest, largest and most diverse organization of public health professionals in the world. The association aims to protect all Americans and their communities from preventable, serious health threats and strives to assure community-based health promotion and disease prevention activities and preventive health services are universally accessible in the United States. APHA represents a broad array of health providers, educators, environmentalists, policy-makers and health officials at all levels working both within and outside governmental organizations and educational institutions.

Amicus Curiae the American Society of Addiction Medicine ("ASAM") is a national medical specialty society of over 3,000 physicians dedicated to improving the treatment of alcoholism and other addictions, educating physicians and medical students, promoting research and prevention, and informing the medical community and the public about these important issues.

Amicus Curiae the American Thoracic Society ("ATS"), founded in 1905, is an independently incorporated, non-profit, educational and scientific organization of physicians and scientists that focuses on respiratory and critical care medicine. ATS has approximately 13,500 dues-paying members around the world, who help prevent and fight respiratory disease internationally through research, education, patient care, and advocacy. The long-range goal of ATS is to decrease morbidity and mortality from all respiratory disorders and life-threatening acute illnesses. Although ATS members work on diverse issues, all share an

interest in tobacco use prevention, tobacco cessation and the treatment of tobacco-related disease.

Amicus Curiae the Lung Cancer Alliance, founded in 1995, is the only national non-profit organization dedicated exclusively to support, education and advocacy for lung cancer patients, caregivers, survivors and for the 45 million former smokers and others at risk for developing lung cancer.

Amicus Curiae the National Association of Local Boards of Health ("NALBOH") is the grassroots of public health and the national voice for effective and competent public health governance. Its mission is to strengthen and prepare local boards of health, enabling them to protect and promote the health of their communities, through education, technical assistance, and advocacy. NALBOH has been engaged in establishing a significant voice for local boards of health on matters of national public health policy, including tobacco use prevention and control. NALBOH's satellite office in Washington, D.C., has allowed it to have a permanent presence with other national public health organizations, while maintaining its grassroots with its main office in Bowling Green, Ohio.

Amicus Curiae the National Research Center for Women & Families is a nonprofit, nonpartisan organization that is dedicated to improving the lives of adults and children. NRC promotes the health and safety of women, children, and families, by using objective, research-based information to encourage new, more effective programs and policies. The Center achieves its mission by gathering and analyzing information and translating that information into clearly presented facts and policy implications that are made widely available to the public, the media, and policy makers.

Amicus Curiae the National Latino Council on Alcohol and Tobacco Prevention ("LCAT") is a non-profit,

national organization created in 1989 by a group of Latino public health professionals and community advocates from throughout the United States. LCAT is unique since it is the only Latino national organization dedicated to reducing the harm caused by alcohol and tobacco in the Latino community through research, advocacy, policy analysis, community education, training and information dissemination.

Amicus Curiae the Society for Research on Nicotine and Tobacco is the leading international organization for scientists doing work in the areas of nicotine and tobacco research. The mission of the Society is to stimulate the generation of new knowledge concerning nicotine in all its manifestations, from molecular to societal. The Society has three main aims: to sponsor scientific meetings and publications fostering the exchange of information on nicotine and tobacco; to encourage scientific research on public health efforts for the prevention and treatment of tobacco use; and to provide a means by which legislative, governmental, regulatory and other public agencies can obtain expert advice and consultation on nicotine and tobacco.

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No. 05-1256

IN THE

Supreme Court of the United States

PHILIP MORRIS U.S.A,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court of Oregon

BRIEF OF AMICUS CURIAE CENTER FOR A JUST SOCIETY IN SUPPORT OF THE RESPONDENT

BRIAN G. BROOKS
(Counsel of Record)
Brian G. Brooks, Attorney at Law, PLLC
P.O. Box 605
Greenbrier, Arkansas 72058
(501) 733-3457
(501) 376-0951 (facsimile)

Attorney for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE*[1]

The Center for a Just Society (CJS or the Center) advances and defends the Judeo-Christian principles of human dignity and social justice in law, policy and the public square. CJS works to improve the quality of life of the citizens of this Nation through research, education and advocacy. CJS brings attention and an alternative voice to issues of social justice.

The Center's approach to issues is shaped by a Judeo-Christian point of view that offers the greatest protections and the greatest freedoms for all members of our pluralistic society, not just people of faith. Under this point of view, human dignity is of equal importance to the unborn, the elderly, and individuals at all stages of life, and each individual is equal before the law regardless of societal status. This point of view holds individuals, businesses, and public institutions accountable for their actions.

A just society orders itself based on moral and ethical views of its people, and all laws invariably reflect a moral and ethical point of view. The case before this Court is an expression of a moral and ethical point of view. The people of the State of Oregon have spoken firmly regarding their views on the dignity of human life and the repugnance of corporate greed that seeks to deprive that dignity. CJS believes that Oregon's expression of its moral and ethical point of

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[1] Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

view, placing human life and dignity over corporate greed and wrongdoing, is appropriate, and that this expression cannot be analyzed as a mathematical formula. CJS submits this brief in order to aid the Court and to express this moral and ethical view supporting the expression of the People of Oregon.

SUMMARY OF THE ARGUMENT

The issues in this case are very different from the Court's previous pronouncements on due-process limits to punitive damages. In this case, the loss at issue is a human life. The actions that caused that loss are typified by a corporate emphasis on profit at the expense of human life.

The corporate excesses that led to this death are not atypical. Cases around the nation regularly examine instances of corporate greed that result in the loss of life. A strong and powerful message should be sent, and is sent by the verdict in this case, that life is important, and the consequences of taking life to advance rapacious greed are weighty.

Punitive damages exist on a firm moral and legal foundation. That moral and legal foundation counsels that greater sums must be paid for greater harms, and that the more reprehensible the conduct, the greater the penalty should be. This Court has previously affirmed, in clear and cogent language, the importance of preventing the evil of wrongful death by way of tort law. It should do so again in this case.

The jury in this case expressed its community's standard for reasonable behavior, and also expressed in

strong terms the value it places on human life. The jury is the best entity in our system of government for setting this standard, consisting as it does of ordinary people from the community brought together at random to hear the evidence and make a determination. The jury is the essence of the judicial system, and this jury's pronouncement of its community standard should be respected and upheld.

The decision of the Oregon Supreme Court to uphold the verdict in this case was appropriate. The Oregon Court showed deference to human life and to the jury system. This Court should do likewise and affirm this case.

ARGUMENT

I. THIS CASE REPRESENTS FUNDAMENTAL CORPORATE EXCESS AT THE EXPENSE OF HUMAN LIFE.

This case is not about the quality of paint on a doctor's luxury automobile. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). It is not about the wrong visited on an individual when his insurance company fails to pay a claim. *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408 (2003). Rather, this case concerns the consequences that must be faced when corporate excess results in the loss of human life. Therefore, this case is, at its core, very different from this Court's previous precedents examining the propriety of punitive damages.

As this Court is fully aware, neither *Gore* nor *Campbell* concerned the loss of human life or personal injury. *Gore* addressed the appropriate level of punitive damages when a corporation misled consumers about whether the paint on a luxury automobile was original or not. *Campbell* addressed the appropriate level of punitive damages when an insurance company failed to pay a claim by an insured, and thus inflicted emotional distress on the insured.

This case is very different. The defendant, Philip Morris Incorporated, engaged in a decades-long campaign of deceit and trickery aimed at enticing smokers to continue to use its deadly products, all the

time aware that cigarettes cause serious health problems and death. *Williams v. Philip Morris Inc.*, 127 P.3d 1165 (Or. 2005). Indeed, as the Oregon Supreme Court's opinion below makes clear, Philip Morris and other tobacco companies initiated a campaign as early as 1954 that sought to undercut reports that tobacco use caused cancer, and to place doubt in the minds of consumers regarding negative reports. This campaign included phantom research efforts into the effects of tobacco that took place while manufacturers were working to manipulate the delivery of nicotine so as to achieve the maximum addictive effect.

Implicit in these facts is that Philip Morris and other tobacco manufacturers engaged in this scheme of deception for one simple reason: greed. Simply put, Philip Morris could not make money if smokers quit smoking. Reports that cigarettes caused serious health problems and death would lead to fewer people smoking. Thus, Philip Morris had to stem the tide and find a way to maintain sales. Its decision to do so placed its bottom line over the lives of those who used its products.

The result was predictable. Jesse Williams, according to this jury, accepted Philip Morris's campaign of deception and did not quit smoking. Eventually, lung cancer caused by cigarettes killed him. His death was the direct result of Philip Morris's conscious efforts to keep Jesse Williams and others smoking and using its products regardless of its knowledge that serious health problems and death could result.

Unfortunately, Philip Morris's actions are exemplary of an all-too-common theme. Certainly, most corporations in this nation are good corporate citizens, and nothing written here is meant to indict the whole of America's corporate community. However, many corporations today are driven by seemingly unrestrained excess. This excess, in greater frequency, is resulting in injury and death, often to the most vulnerable members of our society. An examination of just a few precedents from the states is useful to see this trend. Notably, each of these cases was decided after this Court decided *Campbell*, thus highlighting the currency of the problem.

Few would question that those residing in our institutions of long-term-care, otherwise known as nursing homes, are among the most vulnerable in our society. Unfortunately, these individuals are also among the most abused. Such abuse visited on 94-year-old Margaretha Sauer in Mena, Arkansas resulted in a large punitive-damages verdict against a nursing-home conglomerate in *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark 2003), cert. denied, 540 U.S. 1012 (2003).

The *Sauer* plaintiff's theory of liability was simple and similar to that advanced by the plaintiff in this case. The *Sauer* plaintiff asserted that the nursing-home conglomerate that owned the facility placed profit over quality care and caused injury to Mrs. Sauer including her death. This theory was supported by evidence of short staffing, altering medical records, "staffing up" during government inspections (called surveys) *Id.* at

354 and, perhaps most importantly, the testimony of a former vice president who described a "change in corporate philosophy in 1996 stressing profits over care." *Id.* at 352, 354.

Likewise, in *Miller v. Levering Regional Health Center*, ED 86933 (Mo. Ct. App. July 11, 2006), the Missouri Court of Appeals just recently upheld a punitive verdict against a residential facility where elderly, mentally ill Ocie Birkhead died due to the facility's failure to monitor her condition after she fell and hit her head. Central to the plaintiff's theory of recovery was the fact that the facility was understaffed. Staffing, in turn, is a major expense of such facilities. Lower staffing increases profits, but it also decreases care and causes death and serious injury. *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes – Report to Congress, Ch. 6.; Elder Abuse in Residential Long-Term Care Facilities: What is Known About Prevalence, Cause and Prevention: Testimony Before the U. S. Senate Committee on Finance,* Statement of Catherine Hawes, Ph.D. (June 18, 2002). Ocie Birkhead was left unattended until she had vomited on herself and suffered an irreparable hemorrhage that killed her. The Missouri Court of Appeals correctly referred to this conduct as reprehensible.

Cases of corporate excess leading to injury and death are not, however, limited to long-term-care specifically or medical care generally. For example, in *Forsythe v. Clark USA, Inc.*, 836 N.E.2d 850 (Ill. Ct. App. 2005), the Illinois Court of Appeals examined whether allegations of a corporate philosophy emphasizing

profits over employee safety stated a cause of action for direct liability against a parent corporation. In that case, two maintenance workers were killed when a fire erupted in a refinery while they were on their lunch breaks. Their estates sued the refinery's parent company alleging direct liability for the parent's "overall business strategy" that "focused on minimizing operating costs and limiting capital expenditures" at the cost of safety. *Id.* at 851. The Illinois Court held that a cause of action was stated.

The evidence relied on by the plaintiffs is telling. They pointed to a series of "cutbacks. . . that undermined safety, training, and maintenance. . . and. . . created an unreasonable risk of harm to others. . . ." *Id.* at 853. As part of an overall cutback in the budget and capital expenditures, the refinery had to "cut back its maintenance department staff and cancel its training program for new operators, causing both a deteriorization of the infrastructure at the refinery . . . and an overload of work on the undermanned crews." *Ibid.* These conditions, in turn, caused the explosion when untrained, unqualified crews tried to replace a valve. *Id.* at 851.

These cases are in no way meant to be exhaustive. They are merely examples of cases, like the one before this Court, where unbridled, rapacious corporate greed led to personal injury and death. [2] They are

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[2] Both before and after *Campbell*, state courts have emphasized that a conscious decision by a corporation to emphasize profit over safety justifies a substantial award of punitive damages. See, *e.g.*, *Union Pacific Railroad Co. v. Barber*, 149 S.W.3d 325 (Ark. 2004) ("the

exceedingly relevant to the questions before this Court. According to Philip Morris and the *amici* supporting it, no award of punitive damages can exceed a certain mathematical limit and satisfy due process, no matter how egregious the conduct and no matter how devastating the injuries caused. They similarly argue that a jury cannot base its award on the widespread devastation caused by the practices at issue because to do so would punish Philip Morris for damage done to those not before the court.

These positions should not prevail. Each point ignores the importance of human dignity and opens the door for corporate excess unchecked, or inadequately checked, by moral and ethical standards of behavior.

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record in this case reflects the development of a corporate policy at Union Pacific that put company profits before public safety."); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 384 (1981) ("There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety."); *Holmes v. Bridgestone/Firestone*, 891 So.2d 1188, 1191-92 (Fla. Ct. App. 2005) ("the proffer reflected facts from which it could be found that Firestone knew about the tread separation, but delayed warning the public in order to protect its own financial interests. Such a finding would support punitive damages"); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 835-36 (Minn. 1988)(concluding that Goodyear's inadequate distribution of warnings about the danger of exploding rims, based on a corporate policy to restrict advertising dollars for projects that are not promoting product sales, was "willful indifference to the safety of others."); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980) (upholding a punitive damages award against a manufacturer who continued, for profit reasons, to supply flammable nightwear when nonflammable material was available).

The end result of such unchecked excess is more than twice-painted BMWs and unpaid insurance claims. It is the loss of human life.

The jury system serves as a check and balance on reckless conduct like that demonstrated by Philip Morris. The People of the State of Oregon have spoken regarding the importance of human life and dignity by way of the punitive-damage award in this case. The message they have delivered is that human life deserves the utmost respect, and that corporate excess that places profit over life cannot be tolerated in a civilized society. This statement of public policy delivered by perhaps the most representative of all arms of government itself deserves respect. Affirming the decision of the Oregon Courts affirms that respect, and it also affirms the basic moral and ethical message that human life is more important than corporate interests.

II. THE DIGNITY OF HUMAN LIFE SHOULD BE GIVEN THE UTMOST IMPORTANCE IN THIS CASE.

A reading of the briefs filed by Philip Morris and *amici* supporting its position reveals a desire to limit punitive damages to a predictable, business-planning range. Completely absent from this analysis is any discussion of the importance of human life and dignity or the moral basis for punitive damages. This oversight skews the question. This case should not be decided without thorough consideration of the human and moral element of the punitive-damages award made in

this case. Indeed, that element should be the overriding issue in the analysis.

Punitive damages clearly have a moral basis. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L.Rev. 705 (1989) (hereafter *Moral Foundations*). These moral foundations focus on retribution for the wrong done, and deterrence of future, like wrongs. *Campbell*, 538 U.S. at 416; *Gore*, 517 U.S. at 568; *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 19 (1991). See also Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L.Rev. 1257 (1976) (examining retribution and deterrence as justifications for punitive damages generally and in the products-liability context); Galligan, *Disaggregating More-Than-Whole Damages in Personal Injury Law; Deterrence and Punishment*, 71 Tenn. L.Rev. 117 (2003) (advocating a separation or disaggregation of the deterrence and retribution elements of punitive, or more-than-whole, damages) (hereafter *Disaggregating the Whole*). Both goals are morally, ethically and legally appropriate. *Moral Foundations* at 707 (noting that the legal legitimacy of punitive damages is dependent on their moral legitimacy. That moral legitimacy is grounded on ideals of freedom, utility, power, truth and trust).

These moral imperatives dictate that the amount of punitive damages, in the words of Judge Posner, "should be proportional to the wrongfulness of the defendant's actions." *Mathias v. Accor Economy Lodging*, 347 F.3d 672, 676 (7th Cir. 2003). A corollary of this idea is "that sanctions should be based on the wrong done rather than on the status of the defendant," a notion

Judge Posner describes as "the core of the Aristotelian notion of corrective justice." *Ibid.* This guidance as to "amount" is further informed by the notion that the "award of punitive damages" in a particular case can serve "the additional purpose of limiting a defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away." *Id.* at 677. See also *Disaggregating the Whole* at 132-146 (examining the reasons why punitive conduct will be under prosecuted and under deterred if only the actions and individuals before the court in a particular case inform the punitive verdict). Judge Posner, it seems, speaks directly to the excesses caused by an unrelenting, unchecked pursuit of profit at the expense of human life described in this brief, and to the notion that such actions merit increased punitive awards.

These ideas of increased punitive-damages awards for greater harms, more reprehensible actions, and repeated yet possibly unprosecuted behavior fit neatly within this Court's recent precedents describing the due-process limits on such awards. In both *Gore* and *Campbell*, this Court counseled that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 574). This "reprehensibility" analysis, in turn, focuses on the very issues described above that form the moral basis for punitive damages: the type of harm caused, whether the tortious actions were exemplified by a disregard for the health and

safety of others, the vulnerability of the victim, the repetition of the tortious actions, and whether those actions evidenced "malice, trickery or deceit." *Ibid* (citing *Gore*, 517 U.S. at 576-77).

In a case like the one before this Court, these moral and legal issues should rightly dominate the debate. Again, this case does not focus on mere economic loss. Indeed, the pure economic loss determined by the jury was minimal, only $21,485.80. Rather, the focus in this case is repeated, deceptive, calculated conduct that caused the death of Jesse Williams. This loss cannot be reduced to a neat mathematical formula, reduced to present value, that "compensates" the victims and rights the wrongs.

The value of human life has guided this Court in the past where even benign corporate interests have sought to avoid liability by shielding themselves behind a beneficial interpretation of the due-process clause. Seventy-nine years ago, this Court passed on a corporation's due-process challenge to Alabama's wrongful-death statute that imposed *respondeat superior* liability on an employer whose employee caused a negligent death. Writing for the Court, Mr. Justice Stone held:

> As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a

> position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in the common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only on those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented.

Pizitz Co. v. Yeldell, 214 U.S. 112, 116 (1927) (citing *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U.S. 281 (1908); *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33 (1916); *Wilmington Mining Co. v. Fulton*, 205 U.S. 60 (1907)).

This Court did not shy away from the moral mandate before it in 1927, and it should not do so now. The corporate interests at stake in this case are anything but benign. The value and dignity of human life, and the efficacy of the tort system in protecting it, hang in the balance. Philip Morris seeks a system where its wrongs can never be punished more than a definitive multiplier above the damage it causes to a single victim regardless of the number of times the harm is caused and regardless of the reprehensibility of the conduct. This approach would ignore the states' interest in attempting "to preserve human life by making homicide expensive."

The Supreme Court of Oregon was right. Philip Morris's conduct was reprehensible in every respect. The result of that conduct was as damaging as damage can be, the death of a human being. Moreover, it does not stretch credibility to write that the "evil" was much more than "the negligent destruction of human life." Malicious and reckless, at minimum, are much more apt terms. The Oregon Court should be affirmed.

III. THE COMMUNITY STANDARD ANNOUNCED BY THE JURY SHOULD BE UPHELD.

The jury spoke clearly in this case. That voice should be heard and affirmed. The importance of trial by a jury in this nation is well established. When the Founders listed their grievances against "the present King of Great Britain" in the Declaration of Independence, they included among them "depriving us in many cases, of the benefit of Trial by Jury." The Bill of Rights and state constitutions, of course, expressly include the right to trial by jury. Juries are so important in this nation that criminals do not go to prison if juries so determine.

With respect to awards of punitive damages, early decisions "show both a respect for the jury's discretion and a hesitancy to interfere with its judgment." Borowsky and Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L.Rev. 147, 152 (1983) (hereafter *The Integrity of Jury Verdicts*)(citing *Huckle v. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763)). Juries, such as this jury, are

made up of local citizens, and their composition is not known until the trial begins. Neither side pays juries, and the evidence they hear must meet a threshold of reliability. Neither side can approach a jury outside the presence of the other. Thus, the system under which the jury makes its decision is perhaps the most fair of any yet devised.

Historically, courts and legislatures have respected this community voice and deferred to juries' pronouncements on punitive damages, and with good reason:

> An examination of judicial opinions and statutory law reveals that the jury's power to award punitive damages proceeds from its ability to speak for the community. As a group, the jury is in the best possible position to function as the community's conscience. A jury's reactions of shock and outrage presumably mirror those of the community as a whole. Thus when the jury decides to make a punitive award, it is expressing society's disapproval; and when it sets the amount of an award, it measures society's outrage and determines the degree of punishment that society believes will deter the defendant and others like him.

The Integrity of Jury Verdicts, at 152-53 (citing *Orkin Exterminating Co. of So. Fla. v. Truly Nolen, Inc.*, 117 So.2d 419, 423 (Fla. 1960)).

Jurors function as part of the judicial branch. See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922) (Taft, C.J., for the Court). As Chief Justice Taft noted,"[t]he jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors, actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse." *Ibid.* The corollary, of course, is also true. Through the jury system, people at the local level decide what is reasonable and acceptable in their own communities. This approach is especially appropriate in the tort system where the entire question is what is reasonable under the circumstances.

This Oregon jury decided what is reasonable in Oregon. It clearly mandated that a scheme whereby users of a dangerous product were duped into believing that reports about its danger were false or exaggerated, when the purveyors of the scheme knew otherwise, will not be tolerated. That common-sense determination deserves great deference where, as here, human life hangs in the balance. The Oregon Court's decision to uphold that verdict should be affirmed.

CONCLUSION

The decision of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

Brian G. Brooks
(Counsel of Record)
Brian G. Brooks, Attorney at Law, PLLC
P.O. Box 605
Greenbrier, Arkansas 72058
(501) 733-3457
(501) 376-0951 (Facsimile)

Attorney for Amicus Curiae

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN D. HACKER
(*Counsel of Record*)
LESLEY R. FARBY
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of petitioner. Letters of consent have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber is filing this brief in support of petitioner because the rational and equitable administration of punitive damages is a matter of profound concern to the Chamber's members. The Chamber's members welcomed this Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which they viewed as providing valuable guidance on the scope of conduct for which punitive damages may be imposed. Many state and lower federal courts, however, have failed to adhere to the principles set forth in those decisions and in the other punitive damages cases decided by this Court. The decision of the Oregon Supreme Court in this case is illustrative of the problem. The Chamber submits that reversal of that deci-

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the Chamber and its members, made a monetary contribution to the preparation and submission of this brief.

sion, and a firm resolution of the two issues on which certiorari was granted, will bring much-needed clarity to key principles governing the administration of punitive damage awards in federal and state courts throughout the nation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In addition to reviewing punitive damages awards for substantive excessiveness, the Court's punitive damages opinions have long "strongly emphasized the importance of the procedural component of the Due Process Clause." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994). These opinions express special concern with the problem of inadequately guided juries, which invites "extreme results that jar one's constitutional sensibilities." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). Absent sufficient guidance on how to determine appropriate punitive awards, juries can do "little more than . . . what they think is best," and are "left largely to themselves in making this important, and potentially devastating, decision." *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring). In particular, the failure to tether a jury's discretion closely to the proper function of punitive damages creates a grave risk that they "will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Oberg*, 512 U.S. at 432. Accordingly, this Court has long emphasized the importance of providing "adequate guidance" to jurors charged with the societal function of meting out civil punishment on behalf of the community. *Haslip*, 499 U.S. at 18; *see State Farm*, 538 U.S. at 418.

More recently, this Court has expressed concern with the practice of using a single-plaintiff lawsuit as a vehicle for punishing a defendant broadly for uncharged, unadjudicated conduct. *See State Farm*, 538 U.S. at 422-23. That is precisely what happened in this case. The trial court, ignoring

this Court's decision in *State Farm*, and failing to provide the jury with proper guidance, allowed the jury to consider hypothetical, unadjudicated harm to non-parties in deciding the amount of punitive damages to award respondent. Thus unmoored from the facts and conduct at issue in respondent's own case, the jury – quite predictably – awarded punitive damages in an amount out of all reasonable proportion to the compensatory damages awarded to respondent.[2]

The Oregon Supreme Court not only failed to correct that procedural error, but instead compounded the error, by failing to hew closely to a key punitive-damages rationality guidepost reaffirmed by this Court in *State Farm*. *See* 538 U.S. at 425. That guidepost requires a reasonably close ratio between the amount of punitive damages awarded and the amount of compensatory damages awarded, thereby ensuring that a given punitive damages award bears a reasonable relationship to the harm caused to the particular plaintiff in the case. The ratio guidepost thus works hand in glove with *State Farm*'s prohibition against punishment for unadjudicated harms to non-parties – absent serious enforcement of the ratio guidepost, there can be little assurance that an outsized punitive damages award does not reflect *sub silentio* punishment for unproven harms to non-parties.

As a matter of basic procedural due process, it is critical that courts give jury instructions that provide adequate guidance both as to the prohibition against punishment for unadjudicated harms and as to the proper ratio limits on punitive damages. Absent proper guidance on these points, defen-

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[2] The punitive damages award of $79.5 million was almost 97 times the $821,485 in compensatory damages awarded by the jury for wrongful death, and 152 times the $521,485 statutory maximum for wrongful death damages applicable here. *Cf. State Farm*, 538 U.S. at 426 ("courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm *to the plaintiff* and to the general damages recovered") (emphasis added).

dants involved in mass-tort-type litigation will be denied a reasonable opportunity to defend themselves in individual cases and will be subjected to multiple punishment for the same harms. And because of innate cognitive limitations on jurors' ability to assign coherent dollar values to blameworthy conduct – limitations demonstrated in important social science research conducted within the last decade – juries deprived of this guidance are forced to issue punitive damages awards on an essentially random basis.

If the due process to which all defendants are entitled means anything, it must bar the deprivation of property through procedures that demonstrably guarantee erratic and unpredictable results in comparable cases. Juries must be instructed to limit punitive damages awards to the amount necessary to punish the defendant for the harms caused to the plaintiff, and to limit such awards to a reasonable relationship to such harm, as reflected in a confined ratio between the punitive and compensatory awards.

ARGUMENT

I. PERMITTING JURIES TO PUNISH DEFENDANTS FOR UNADJUDICATED HARM TO NON-PARTIES VIOLATES PROCEDURAL DUE PROCESS

The Oregon Supreme Court squarely held that a defendant may be punished not only for conduct that injured the plaintiff, but also for conduct that injured others not before the court. In the Oregon Supreme Court's words, the massive award was justified because "Philip Morris harmed a much broader class of Oregonians," Pet. App. 23a, and "the jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large." Pet. App. 18a.

The Oregon Supreme Court's holding that a punitive

damages award may be based on unadjudicated harm to non-parties directly conflicts with this Court's admonition in *State Farm* that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423. Recognizing that a "defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business," *id.*, this Court rejected the idea that a defendant could be punished for conduct to individuals not before the court, *see id.* at 421 ("Any proper adjudication of conduct that occurred . . . to other persons would require their inclusion.").

As elaborated below, allowing jurors to impose punitive damages for harm to non-parties raises at least two serious procedural due process concerns: the defendant is (1) deprived of its right to mount a defense to non-parties' claims, and (2) exposed to a substantial risk of multiple punishment for the same conduct. These due process concerns can be mitigated only through a clear instruction prohibiting the jury from punishing the defendant for harm to non-parties–the very type of instruction petitioner sought and was denied in this case.

A. Punishing A Defendant For Harm To Non-Parties Denies The Defendant Its Due Process Right To Defend Claims Against It

By permitting the jury to punish petitioner for harm to non-parties, the trial court allowed respondent's lawsuit to become a vehicle for vindicating the rights of a "broader class of Oregonians" purportedly harmed by petitioner's conduct. Pet. App. 23a. In other words, the court effectively turned this individual case into a *de facto* class action, without the *de jure* procedural protections deemed essential to the fair deployment of the class action device.

The class action procedure was devised to allow the

claim of a single plaintiff to represent the claims of hundreds or thousands or millions of other individuals, but only when the representative plaintiff's claim has so much in common with all the other claims that the defendant fairly can be made simultaneously liable (or absolved of liability) to all claimants in a single, all-or-nothing proceeding. *See Developments in the Law – Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 877, 936-38 (1958). The due process risk inherent in such a proceeding is self-evident: if the class representative's claim is not typical of the other claims or if the class members' claims differ materially among themselves, proceeding on a representative basis will almost certainly deny the defendant its right to mount a full and fair defense against each individual claim. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998).

The very essence of due process, of course, is the right to be heard before a judgment may be entered for or against a party. *See Boddie v. Conn.*, 401 U.S. 371, 377 (1971) ("due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"). This includes the "'opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *accord Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938). Accordingly, standard class action rules preclude class litigation on behalf of absent parties *unless* the plaintiff first proves that all such parties are situated so similarly that litigation of one claim is effectively and fairly the litigation of all other claims as well.

It is impossible to contend that this case could have satisfied the requirements for proceeding as a class action, given that each claimant would be required to prove the extent of his or her personal reliance on various statements made by petitioner over the course of many years (most of which respondent's husband never heard or was exposed to). Indeed, the courts have uniformly denied class certification in other tobacco-safety-misrepresentation cases for precisely that reason. *See, e.g.*, *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); *Estate of Mahoney v. R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150, 154 (S.D. Iowa 2001); *Badillo v. Am. Tobacco Co.*, 202 F.R.D. 261, 264 (D. Nev. 2001); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 492 (S.D. Ill. 1999); *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 599 (App. Div. 1998), *aff'd*, 698 N.Y.S.2d 615 (1999).

Respondent in this case nevertheless was effectively allowed to circumvent basic class action requirements – and the due process protections they are designed to provide – by proceeding with her case individually and then seeking punishment on behalf of what the Oregon Supreme Court referred to explicitly as a "broader *class* of Oregonians." Pet. App. 23a (emphasis added). That approach plainly denied petitioner any opportunity to challenge the existence, cause, or magnitude of any supposed injuries of the non-parties – overlooking the obvious possibility that many of the other ostensibly injured non-parties "may not have been able to establish specific elements – or that the defendant may have been able to establish unique affirmative defenses – related to their individual claims." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 601 (2003). Indeed, the non-parties were not even identified at trial, making it literally impossible for petitioner to defend against their claims, which thus remained purely hypothetical for purposes of assessing punitive damages. The

due process violation could hardly be more flagrant:

> If due process will not permit a defendant to be tagged with compensatory damages for the wrongs that it visited upon a large number of people without being afforded the opportunity to contest individual elements of each alleged victim's claim and to raise victim-specific affirmative defenses, it cannot tolerate the imposition of punitive damages in these circumstances, especially given that punitive damages for each wrong are expressly contingent upon an entitlement to compensatory damages. The defendant can be punished through the mechanism of punitive damages for the harm caused to third parties only if it committed legal wrongs against all of those parties. The only way to establish that it did so is through individual tort suits (or a collective proceeding in which the defendant is afforded the opportunity to defend against each allegation), not litigation in which the plaintiff effectively strips the defendant of all of its defenses.

Id. at 657.

In any other legal context, the suggestion that due process allows a person to be punished by a court for unproven, unadjudicated conduct affecting unidentified non-parties would be met with derision. This approach not only violates due process, it contradicts the most basic Anglo-American understanding of the judicial function, which is "intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 & n.10 (1974). The judicial function stands in "sharp contrast" to the *legislative* role, *id.*, which is to address the general welfare of the broader public. "Unlike a legislature, whose judgments may be predicated on educated guesses and need not necessarily be grounded in facts adduced in a hearing . . . a jury is bound to consider only evidence presented to it in arriving at a

judgment." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring). Thus, when individual courts and lay juries are called upon to issue broad, quasi-legislative pronouncements on matters they have not adjudicated – and could not rationally adjudicate in a single judicial proceeding – they are performing a function they simply are not designed or equipped to handle. It should come as no surprise when such proceedings produce arbitrary and irrational results, as they so often do. *See Gore*, 517 U.S. at 596 (Breyer, J., concurring) (when juries are asked "to create public policy, and to apply that policy, not to compensate a victim, but to achieve a policy-related objective outside the confines of the particular case," there is a "substantial risk of outcomes so arbitrary that they become difficult to square with the Constitution's assurance, to every citizen, of the law's protection"); *see also infra* Part II (describing sociological research demonstrating cognitive limitations on jurors' ability to adjudicate punitive damages rationally).

This case illustrates the point. The jury below, denied the guidance necessary to understand how it should limit a punitive award to address only the harm at issue in respondent's case, issued an award that far exceeded any constitutionally reasonable amount for the conduct actually adjudicated in respondent's case. *See supra* note 2 (noting highly disproportionate ratio of punitive damages to compensatory damages); Pet. 1-2 (describing undisputed facts establishing that decedent was aware of risks associated with cigarette use). And unless the decision below is reversed, it will *necessarily* lead to other such indefensible awards, as other plaintiffs' lawyers follow the decision's lead and invite juries to punish defendants for unproven, unadjudicated harms to non-parties. The excessive and irrational awards that will inevitably result will place greater strain not only on the defendants unfairly subjected to such awards, but also on the increasingly challenged capacity – and credibility – of the

nation's civil justice system.

B. Punishment For Harm To Non-Parties Also Invites Unjust And Socially Wasteful Multiple Punishment

The *de facto* class action punitive damages award issued below also subjects petitioner to the direct and substantial risk of being punished repeatedly for the exact same conduct causing the exact same harm to the exact same people. Although the award in this case was unambiguously intended to punish petitioner for harms it caused to non-parties, nothing prevents those non-parties from now bringing their own actions seeking duplicative punishment for the selfsame harm. Indeed, if affirmed, the massive size of the award in this case all but guarantees that other potential claimants, for whose injuries petitioner was already punished, will file their own lawsuits seeking to collect their own payouts for the harms to a "broad[] class of Oregonians." Pet. App. 23a.

An essential function of a true, *de jure* class action is to ensure that, when a classwide proceeding is appropriate, a judgment for or against the defendant will preclude subsequent actions by class members seeking to establish the same liability. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985). The *de facto* class punishment imposed below affords no such protection. "Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff . . . deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). The law of *res judicata* also affords no protection, since it binds only persons who were actually parties to a prior judgment. *See Richards v. Jefferson County*, 517 U.S. 793, 800-02 (1996). In short, as Judge Friendly observed in his seminal opinion examining the multiple punishment risk posed by punitive damage awards based on harms to non-parties, there is "no principle whereby the first

punitive award exhausts all claims for punitive damages and would thus preclude future judgments." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

Accordingly, petitioner faces the manifestly unjust prospect of being punished, over and over again, for the same harm to the same broad class of people, essentially guaranteeing that the final tally will far exceed the maximum amount that permissibly could be imposed for such harm in any one case. *See Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 51 (Tex. 1998) ("[I]f a single punitive damages award becomes unconstitutional when it can fairly be categorized as 'grossly excessive' in relation to a state's legitimate interests in punishment and deterrence, it follows that the aggregate amount of multiple awards may also surpass a constitutional threshold.") (quoting *Gore*, 512 U.S. at 589).

It is no comfort to defendants that some jurisdictions – including Oregon – allow future juries to consider the punishment already imposed against a defendant in determining the amount of punitive damages to award.[3] Such rules simply place a defendant in the untenable position of arguing that it should not be liable or punished for alleged wrongdoing while simultaneously introducing evidence that the same conduct caused a prior jury to award large punitive damages. Logic and experience tell us that evidence of a prior large award is unlikely to persuade a subsequent jury to issue a small award or no award. As Judge Friendly observed, "we think it somewhat unrealistic to expect a judge, say in New

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[3] *See, e.g.*, Or. Rev. Stat. § 30.925(2)(g) (listing as one of many criteria for consideration in determining punitive damages award: "The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damages awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.").

Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare." *Roginsky*, 378 F.2d at 840. Indeed, the more likely effect is the opposite: when a defendant introduces evidence that it has already been subject to punitive damages for the same course of conduct, a jury is almost certain to use the prior award as an "anchor" for its own award or as justification for imposing an even higher punitive damages award. *See* Cass R. Sunstein *et al.*, *Punitive Damages: How Juries Decide* 216-19 (2002) ("*How Juries Decide*") (discussing empirical research demonstrating "anchor effects" in juries' punitive damages deliberation).

The reality is that permitting a defendant to be punished for collective harm to non-litigants substantially increases the likelihood that corporate defendants will be subjected to repeated – and oxymoronic – "take all" lawsuits. And the opportunity to get future "credits" certainly is of no use to a defendant that *wins* subsequent cases brought against it. Similarly, even if a defendant were to prevail in the lion's share of individual cases brought against it (and therefore be punished for harms for which another jury absolves the defendant), a single punitive award based on harm to others could essentially wipe out all of its previous or subsequent victories. This very case exemplifies that danger. Although petitioner has prevailed in numerous other lawsuits brought by individual smokers invoking theories similar to respondent's, this single verdict punishes petitioner for *all* such conduct in the State of Oregon. This approach allows a single (possibly aberrational) jury to impose state-wide sanctions against a corporate defendant for injuries that never need be proven in court. The fear of such an outcome distorts the legal process by placing "insurmountable pressure on defendants to settle . . . even when the probability of an adverse judgment is low." *Castano*, 84 F.3d at 746; *see In re*

Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298-99 (7th Cir. 1995).

This inordinate pressure to settle has severe ramifications beyond the injustice to the defendant itself. As several prominent scholars have explained, exposing companies to multiple, massive punitive damages awards can result in overdeterrence, causing firms to take precautions that may be socially wasteful. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 882 (1998); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 322-27 (1998). When the risks attending the introduction of a product or service or business practice appear unacceptably high, the prudent actor stays out of the game – to society's detriment. *See Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring) (threat of enormous punitive damages awards has a detrimental effect on the research and development of new products). Although all litigation carries a risk of erroneous results, punishing an entire course of conduct on the basis of a single potentially wrongful decision inflates that risk unnecessarily, and increases the prospect that the defendant will be deterred from engaging in socially beneficial activities. *See* Colby, *supra*, at 612 n.98.[4]

The multiple punishment problem created by the approach endorsed below is thus not only a due process prob-

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[4] Permitting a single plaintiff to recover damages for purported class-wide injury also potentially deprives future plaintiffs of their own monetary recoveries. Even if a later jury is not persuaded to "discount" its own punitive award based on other punitive damages awards already imposed against the defendant, as a practical matter, the pool of money available to subsequent plaintiffs will be substantially reduced by the recovery of the initial plaintiff. *See generally Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834-42 (1999) (discussing judicial responses to "limited fund" situations in class actions).

lem – it is an economic and social problem of broad dimension. This Court should make clear that punitive damages may be awarded to punish the defendant only for harms *to the plaintiff*, and not for unadjudicated harms to non-parties.

C. Jury Instructions Of The Kind Rejected Here Are Necessary To Mitigate The Risks Of Punishing For Harm To Non-Parties

In every punitive damages case, "proper jury instruction is a well-established and, of course, important check against excessive awards." *Oberg*, 512 U.S. at 433. In the nuanced context of considering harm to non-parties, clear jury instructions are particularly important. As explained above, this Court in *State Farm* rejected the notion that juries may punish a defendant for harm to individuals not before the court. But the Court did not categorically bar all *consideration* of "other similar act" evidence; rather, the Court emphasized that such evidence might be relevant, but only to the extent that it demonstrates the "deliberateness and culpability" of the defendant's conduct. *State Farm*, 538 U.S. at 422; *see also Gore*, 517 U.S. at 574 n.21 (evidence of out-of-state sales may be "relevant to the determination of the degree of reprehensibility of the defendant's conduct" but may not be used "as a multiplier in computing the amount of [the] punitive sanction"). This distinction is critical, but there is no doubt that, absent clear guidance as to the proper role of such evidence, it is a distinction easily enough lost on lay jurors, creating a serious risk that evidence will be misused in the punitive damages determination.

The specific danger is that evidence introduced ostensibly to demonstrate the reprehensibility of the defendant's conduct toward the plaintiff will be used for the impermissible purpose of punishing the defendant directly for harm to parties not before the court. This danger is illustrated by *State Farm* itself. In that case, the plaintiffs had introduced evidence of State Farm's nationwide claims adjustment pol-

icy for the stated purpose of establishing State Farm's motive against its insured, the plaintiff in that case. 538 U.S. at 422. Notwithstanding the asserted purpose of such evidence, this Court found that the lower courts had used the "reprehensibility analysis" as a "guise" to punish the defendant for harm to non-parties. *Id.* at 423 ("Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells.").

State Farm thus exemplifies the need to maintain, during trial and jury deliberation, a clear distinction between permissible and impermissible uses of evidence of harm to non-parties. As the Court recognized, "concerns over the imprecise manner in which punitive damages systems are administered" are "heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded." *Id.* at 417-18. As the Court made clear, evidence of harm to non-parties has at best a limited bearing on basic punitive damages analysis. Such evidence may be relevant, for example, in a product liability case if it demonstrates the manufacturer's foreknowledge of a product's design defect.[5] Evidence of harm to others is *not* relevant to assessing the scope of the harms for which the defendant may be punished, i.e., the harms suffered by the individual plaintiff in the case.

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[5] In this context, evidence of the defendant's conduct *prior to* the specific conduct or transaction at issue may be relevant to the defendant's knowledge, while the defendant's actions subsequent to the conduct or transaction causing the plaintiff's injury would not bear on the defendant's knowledge. *See Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 451-52 (4th Cir. 2001) (reversing punitive damages award on ground that post-design evidence does not demonstrate defendant's contemporaneous knowledge of wrongdoing); *Wohlwend v. Edwards*, 796 N.E.2d 781, 787 (Ind. Ct. App. 2003) (concluding that any relevance of defendant's subsequent acts was substantially outweighed by danger that jury would use such evidence to punish defendant for his subsequent acts instead of conduct that gave rise to plaintiffs' actual damages).

Therefore, courts should exclude evidence of harm to others unless the plaintiff can explain why the specific non-party evidence at issue is relevant to assessing the degree of reprehensibility of the conduct affecting the plaintiff. Moreover, courts must be careful to balance the marginal relevance of this "reprehensibility" evidence against the danger that the jury will be confused or sidetracked by evidence concerning parties not before the court. *See* Fed. R. Evid. 403.

Where courts do admit evidence or argument concerning harm to non-parties, it is essential that they provide juries with clear instructions "to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *State Farm*, 538 U.S. at 418. In *State Farm*, this Court explicitly recognized the need to provide specific instructions to juries regarding the limited scope for which they can consider certain evidence. *Id.* at 422 ("A jury *must be instructed* . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.") (emphasis added).

In this case, despite respondent's repeated appeals to the jury to punish petitioner for the alleged harms suffered by all present and future smokers in Oregon, the trial court refused to instruct the jury that it could not punish petitioner for the effect of its conduct on non-parties. The requested instruction stated:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable conduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those

harms, as those other juries see fit.

Pet. App. 17a-18a. Delivery of that instruction may not have *guaranteed* that the jury would punish petitioner only for the harms at issue in this case, but it would at least have provided the jury with a tool necessary to the performance of its task. In this context, the trial court's failure to provide the jury with *any* guidance on the limited purpose for which it could consider injuries suffered by non-parties deprived petitioner of the minimum procedural safeguards required by due process.[6] Absent a proper instruction, an excessive award was essentially inevitable, as explained above, especially when coupled with counsel's improper argument urging the jury to impose broad punishment for unadjudicated harms to non-parties. Basic guarantees of due process – as well as concern for the rationality of our nation's system of civil punishment – require that punitive damages trials be conducted free from such outcome-determinative procedural flaws.

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[6] This conclusion is also compelled by the three-part procedural due process test prescribed in *Mathews v. Eldridge*, 424 U.S. 319 (1976). First, the "private interest" at stake (*id.* at 335) is plainly significant, as evidenced here by the jury's punitive award of $79.5 million. Second, allowing a jury to punish for unadjudicated harm to non-parties creates a severe risk of an "erroneous deprivation" (*id.*), because – as explained in the text – the jury is likely to impose punishment for conduct other juries would find non-actionable. Finally, a proper limiting instruction would entail no "fiscal and administrative burdens" (*id.*) of any kind; indeed, the State has no legitimate interest in denying an instruction and allowing punishment for unadjudicated harms. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.").

II. DUE PROCESS REQUIRES THAT JURIES BE GIVEN ADEQUATE GUIDANCE ON THE LIMITS OF PUNITIVE DAMAGE AWARDS

The previous section demonstrated the due process risks inherent in refusing to instruct a jury not to punish the defendant for unproven harms to non-parties. Such an instruction, however, is only a starting point for due process – an absolute bare minimum requirement for a fair punitive damages trial. More is required – especially given the fundamental mismatch between what civil juries are designed to do (i.e., find historical facts and adjudicate liability) and what they are often asked to do in assessing punitive damages (i.e., assign a dollar value on behalf of the broader community to the moral blameworthiness of conduct). As discussed in this section, recent sociological research into the actual decisionmaking processes of juries deliberating about punitive damages demonstrates the randomness imbedded in the latter function – randomness that is the very antithesis of due process *of law*.

Because of that randomness, the procedures necessary to ensure that punitive damages awards result from due process must include more than a jury instruction prohibiting punishment for harms to non-parties.[7] As an additional component of procedural due process, courts also should instruct juries to confine their punitive damages awards to a reasonable multiple of the compensatory damages award, consistent with the ratio guidepost at issue in this case.

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[7] The unpredictability of punitive damages dollar awards is, of course, exacerbated when juries are asked to impose punishment for harms extending far beyond the individual harms they have adjudicated in particular cases. The research discussed below thus confirms the due process flaws addressed in the prior section.

A. The Ratio Guidepost Is A Crucial Constraint On Otherwise Random Punitive Damage Awards

The decision below holds that a reviewing court's view of the reprehensibility of the defendant's conduct can "override" the ratio guidepost requiring that the amount of punitive damages awarded bear a reasonable relationship to the amount of compensatory damages awarded. *See* Pet. App. 33a. As petitioner and other *amici* will no doubt explain, this Court's precedents – including especially *State Farm* – make clear that in cases involving substantial compensatory awards, other considerations may increase the permissible ratio of punitive to compensatory damages, but they cannot altogether supplant the ratio limitation.

The Chamber will not repeat that legal analysis; this brief instead summarizes important research into actual jury decisionmaking processes – research that starkly underscores the crucial function of the ratio guidepost in the administration of punitive damages procedures. *See How Juries Decide* x-xi, 22-25 (citing and summarizing studies). As most relevant here, that research shows that the task of assigning dollar values to the wrongfulness of various forms of conduct is a task that jurors *necessarily perform on a random basis*. It is not a matter of effort, intelligence or bad faith – the research shows instead that innate features of human cognition, combined with the individual-case nature of the civil jury function, prevent jurors from assigning dollar awards for punishment on anything approaching a rational, systematic basis. It is only by imposing upon punitive damages awards the discipline of the guideposts identified by this Court – and the ratio guidepost in particular – that courts can ensure that such awards reflect a modicum of rational, *legal* judgment about the dollar value of punishment appropriate for various types of unlawful conduct.

The recent sociological research into actual punitive damages decisionmaking began with a pair of studies exam-

ining whether jurors would – or could – award comparable dollar punishments for similar conduct. *See id.* at 31-62. The first study gave participants identical sets of ten scenarios and asked them both to rank each scenario on bounded 0-6 scales measuring relative outrageousness and severity of punishment deserved, and also to specify a dollar punishment for the conduct. The study showed consistency among participants in terms of their rankings on the bounded scales – but "severe unpredictability and highly erratic outcomes" in the dollar values each participant assigned to the conduct. *Id.* at 37.

The second study essentially repeated the first, but also sought to determine whether the process of deliberation has a moderating effect on the variability of monetized punitive damages judgments. The participants in this study were first asked to rank scenarios and assign dollar values individually, but then were grouped into approximately 500 deliberating mock juries to perform the same task. This study confirmed the first – individual participants reached widely varying judgments as to the proper dollar value to be assigned to the exact same misconduct – but also determined, perhaps surprisingly to some, that the process of deliberation actually *exacerbated* the variability of dollar awards. Even worse, the deliberating juries demonstrated a tendency to award even ***higher*** dollar awards than jurors acting alone. In other words, the deliberative process both increased the overall variability of punitive awards and shifted the range of awards higher. *Id.* at 43-61.

The researchers propose two highly plausible explanations for the demonstrated variability of assigned dollar values and the severity shift caused by deliberation. Variability, they hypothesize, results from a recognized limitation of human cognition referred to in sociological literature as "[m]agnitude scaling without a modulus." *Id.* at 41. A magnitude scale includes a "modulus" when it has a common

reference point – a recognized definition of a particular input as having a specified value, against which all other inputs can be measured. "Thus, for example, a modulus of 100 might be assigned to a noise of a certain volume, and other noises might be assessed in volume by comparison with the modulus." *Id.* Jurors asked to make a punitive damages award, however, generally lack any such modulus: they have only the individual case they have adjudicated, and a numeric range from zero to infinity. Their selection along that range of the one "proper" dollar award to be assigned for the blameworthy conduct before them is, almost by definition, arbitrary and therefore highly erratic and unpredictable.

The researchers offer a related explanation for the observed upward severity shift associated with the deliberative process. The magnitude scale of punitive damages is unbounded – but only at the high end. Once jurors collectively have decided to award a nonzero amount, individual deliberators are more likely to resolve their disagreements over the "proper" amount by tending toward the unbounded end and accepting the higher assessments made by others. *Id.* at 58.

Whatever the exact cognitive cause of the variability and severity shift in jurors' punitive damage assessments, it is empirically demonstrated – and wholly consistent with real-world experience. *See Oberg*, 512 U.S. at 433 n.11 (citing empirical evidence of varying and excessive awards); *Developments in the Law – The Paths of Civil Litigation*, 113 Harv. L. Rev. 1752, 1783 (2000) (citing punitive damages verdicts). Defenders of punitive damages point out – correctly – that trial and appellate courts often reverse or reduce large punitive damages awards, *see, e.g.*, Theodore Eisenberg *et al.*, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 Cornell L. Rev. 743, 777-78 & n.123 (2002), but this observation only underscores the point made here: unless juries are properly guided *ab initio* or constrained *post hoc*, they will *inevitably* issue awards that are

arbitrary, erratic and unpredictable in amount. But in our constitutional system, a person may be deprived of property only through due process *of law* – not through a process that assigns property deprivations on a literally random basis. The ratio guidepost provides in each case a measure of the certainty and predictability that fundamentally distinguishes "law" from arbitrary or capricious governmental conduct.

B. The Ratio Guidepost Should Be Used To Guide Juries *Ab Initio*, Not Just Constrain Their Judgments *Post Hoc*

As it is now beyond reasonable dispute that inadequately guided juries produce effectively random punitive damages judgments, the question remains – what, if anything, can be done about it? This Court has answered that question repeatedly, first in *Gore*, reaffirmed in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and again in *State Farm*: the due process clause requires courts reviewing punitive damages awards to engage in a substantive, *post hoc* review of the size of punitive damages awards to ensure compliance with constitutional limitations.

The Chamber fully endorses that approach, but there is an additional step courts could and should take – one focused more on the "procedural component of the Due Process Clause" as implicated by punitive damages trials. *Oberg*, 512 U.S. at 420. As discussed above, it should be clear that procedural due process requires that juries be instructed not to punish a defendant for unadjudicated harm to non-parties. The Chamber submits that procedural due process dictates the same approach for the reasonable relationship/ratio guidepost. Although juries literally cannot assign punitive damage dollar awards on an *unbounded* scale in any rational or systematic way, if the scale were *bounded* – either by specific ratio limits, or at least by an admonition to ensure that the amount of punitive damages awarded bears a reasonable relationship to the amount of compensatory damages

awarded – then jurors could approach their task more rationally from the outset, seeking to identify where the defendant's conduct falls along a cognizable *range* of potential monetary punishments.

This approach would not supplant subsequent de novo appellate review of punitive damages awards, for the point is not necessarily to dictate the outermost *constitutional* ratio and then let the jury choose any amount within that range. It is, rather, simply to promote a more rational decisionmaking process, both (a) by tethering the jury's discretion to the harm involved in the case before it, and (b) by reducing to manageable proportions the scale on which jurors may assign dollar values to the harm they have adjudicated. If jurors select a value on that scale that is not justified, as a matter of law, by the reprehensibility of the conduct and/or by comparable civil penalties, then the appellate court can and must still reduce the award. But by introducing the ratio guidepost as a guide for the jury's deliberative process, courts can better ensure that the process itself is more rational and less random – closer to the *due process of law* to which all punitive damages trials must adhere.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the decision below should be reversed.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN D. HACKER
(*Counsel of Record*)
LESLEY R. FARBY
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

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IN THE

Supreme Court of the United States

PHILIP MORRIS U.S.A.,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF *AMICUS CURIAE* STEVEN L. CHANENSON AND JOHN Y. GOTANDA IN SUPPORT OF PETITIONER

ROBERT D. FOX *
JOHN F. GULLACE
MANKO, GOLD, KATCHER & FOX, LLP
401 City Avenue, Suite 500
Bala Cynwyd, PA 19004
(484) 430-5700

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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IN THE

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BRIEF OF *AMICUS CURIAE* STEVEN L. CHANENSON AND JOHN Y. GOTANDA IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Amici are law professors who have a professional interest in the proper application and development of the law of punitive damages. Steven L. Chanenson is an Associate Professor of Law at Villanova University School of Law, where he has written on punitive damages, sentencing and criminal procedure. John Y. Gotanda is the Associate Dean for Faculty Research, Professor of Law and Director of the J.D./M.B.A. Program at Villanova University School of Law, and has written widely on punitive damages in the domestic, comparative and international contexts.[1]

[1] Blanket letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any portion of

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court in *Gore* erected three guideposts—(1) the degree of the reprehensibility of the conduct, (2) the ratio between punitive and compensatory awards, and (3) the comparable penalties for similar conduct—to steer courts away from unconstitutionally excessive punitive damages awards. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *see also State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408 (2003). Properly understood, the third guidepost can clarify and significantly enhance this Court's efforts to regulate punitive damages awards. Courts should apply the third guidepost by concentrating on the highest comparable criminal or civil fines set by the legislature and view any such penalties as a "presumptive limit" on punitive damages awards. *See* Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. Mich. J.L. Reform 441, 444 (2004).

As (mis)interpreted by the Oregon Supreme Court, the third guidepost would largely be meaningless. The Oregon legislature set the monetary penalty for the comparable conduct far lower than the punitive award in this case. By ignoring that specific determination, the Oregon Supreme Court failed to follow this Court's general directive to defer to legislative judgments and to ensure that tortfeasors—even, perhaps especially, despised ones—have adequate notice of the magnitude of the punitive damages that may flow from their wrongful conduct. Furthermore, the Oregon Supreme Court failed to recognize that incarceration simply does not translate in any helpful way for evaluating a punitive dam-

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this brief. Other than the research assistance of law students Hilleary Hoelzen, Jessica Khan and Michael Parello, which was provided by Villanova University School of Law, no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

ages award and improperly relied on the existence of a potential incarcerative sentence for comparable conduct. If uncorrected, the decision below would undermine both *Gore* and *Campbell* by providing an inappropriate and easy detour around the purposes of this Court's guideposts.

To stop this subversion of the Court's intended Due Process review of punitive damages awards, *amici* propose a "presumptive limit" approach to the third guidepost. This approach would treat the maximum comparable monetary criminal or civil penalties as the "presumptive limit" for a punitive damages award. The "presumptive limit" approach is consistent with the goals of this Court's punitive damages jurisprudence as set forth in such cases as *Gore* and *Campbell*, satisfies the Due Process need for fair notice, recognizes that important lawmaking authority belongs in the hands of legislatures, and allows for greater proportionality and nuance while evaluating punitive damages awards. Importantly, it is easy to apply and should result in more uniform decisions while still retaining flexibility.

ARGUMENT

I. THE MAXIMUM COMPARABLE MONETARY CRIMINAL OR CIVIL PENALTIES SHOULD PROVIDE THE "PRESUMPTIVE LIMIT" FOR A PUNITIVE DAMAGES AWARD.

Amici urge this Court to adopt a "presumptive limit" approach to the third guidepost. Under this approach, the maximum comparable monetary criminal or civil penalties provide the "presumptive limit" for a punitive damages award. This concept produces a meaningful and workable test for the third guidepost that honors this Court's goals for a Due Process review of punitive damages awards.

The approach to the third guidepost currently taken by most lower courts fails to satisfy this Court's constitutional

objectives. In applying the Due Process Clause of the Fourteenth Amendment as a check against unconstitutionally excessive punitive damages awards, this Court vindicated important principles. For example, in *BMW of North America, Inc. v. Gore*, this Court stressed that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the *severity* of the penalty that a State may impose." 517 U.S. at 574 (emphasis added). Furthermore, courts should afford ""'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."" *Id.* at 583 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part).

As Justice O'Connor noted in her dissent in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 63 (1991), "[t]he Due Process Clause demands that we possess some degree of confidence that the procedures employed to deprive persons of life, liberty, and property are capable of producing fair and reasonable results." To that noble end, this Court adopted and then refined the three guideposts in *Gore* and *Campbell*. Unfortunately, the guideposts have not produced the kind of guidance the Court had hoped. *See* Chanenson & Gotanda, *supra*, at 466-77 (citing cases and commentary). As presently interpreted, many lower courts have had a particularly hard time applying the third guidepost. Indeed, some courts have completely ignored the third guidepost. *See, e.g., Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903 (Mass. App. Ct. 2003). The lower courts need help. They need a new approach.

A. The "Presumptive Limit" Approach To The Third Guidepost Produces A Workable Test That Furthers Constitutional Goals.

A proper interpretation of the third guidepost calls for courts to look to the maximum comparable criminal or civil monetary fines authorized by statute. The highest comparable fine should be the *presumptive limit* on the punitive damages award. If the punitive damages award provided by the jury is smaller than this presumptive limit, the third guidepost would present no bar to the imposition of the award. Of course, the punitive damages award must still survive judicial scrutiny pursuant to the first two guideposts before it would pass constitutional muster. Nevertheless, passing the third guidepost would often be suggestive of a constitutionally permissible punitive damages award.

If the punitive damages award is larger than the presumptive limit, the third guidepost would not be satisfied. Failing the third guidepost would be a strong indication, but not a guarantee, that the punitive damages award is unconstitutionally excessive. If the punitive damages award fails the third guidepost and has an unacceptably large ratio, the award would be unconstitutional in virtually all cases. If, however, the punitive damages award fails the third guidepost but has an acceptable ratio pursuant to the second guidepost, the court would concentrate on the first guidepost's inquiry into reprehensibility. In setting the statutory maximum fine that fixes the presumptive limit, the relevant legislature has spoken to the misconduct's reprehensibility already. Thus, it will be difficult, but not impossible, to conclude that the misconduct is so reprehensible as to justify a punitive damages award greater than the presumptive limit set by the legislature. Indeed, this conclusion is appropriate only in

cases of overwhelming reprehensibility in which the conduct falls outside all bounds of decency.[2]

This presumptive limit approach to the third guidepost is easy to apply, satisfies the Due Process need for notice, is respectful of federalism concerns, and allows for greater proportionality while evaluating punitive damages awards. *See* Chanenson & Gotanda, *supra*, at 478.

B. Monetary Criminal And Civil Penalties Provide Meaningful Notice Of The Size Of Punitive Damages Awards Defendants May Face.

Civil and criminal fines, which are analogous to punitive damages, can provide the appropriate kind of notice to support a punitive damages award. As one court stated, comparable penalties "are the very kind of thing that a reasonable person would think about if he were evaluating the possible consequences of his conduct." *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1090 (D. Alaska 2004). There, numerous plaintiffs sued Exxon for damages caused by the spill of 11 million gallons of oil in Prince William Sound. *Id.* at 1077-79. In reviewing and endorsing the $5 billion

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[2] The Oregon Supreme Court is correct that there are dicta in *Campbell* that would seem to support a punitive damages award dramatically higher than the presumptive limit approach we propose. *See Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1178 (Or. 2006) (citing and quoting *Campbell*, 538 U.S. at 428-29); *cf Haslip*, 499 U.S. at 23 (approving a punitive damages award greater than the comparable criminal fine before *Gore* and *Campbell*). Not only is such a view true *dicta*, *see Campbell*, 538 U.S. at 429 (stating that the conduct "likely would justify" a punitive damages award approximately 100 times the legislatively authorized sanction, but then holding that "[t]he proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts"), it ignores the fact the Court can now consider the experience of the three post-*Campbell* years during which time the third guidepost has continued to be unworkable and, in the mind of some lower courts, largely irrelevant.

award of punitive damages, the court looked to the maximum amount of criminal fines that Exxon could face for its conduct, which totaled $5.1 billion. *Id.* at 1107. To this sum, the court added possible civil fines. *Id.* at 1108-09.[3]

The presumptive limit approach does not pre-determine the outcome; it simply provides a clear, workable test that gives meaningful notice and defers to legislative prerogatives. For example, comparable criminal or civil penalties may support a high punitive damages award, as in *In re the Exxon Valdez*, or may lead a court to reduce a punitive damages award based on comparable penalties. *See Lincoln v. Case*, 340 F.3d 283, 294 (5th Cir. 2003). In *Lincoln*, where the jury found the defendant violated the Fair Housing Act, the court remitted a $100,000 punitive damages award to $55,000, the maximum civil penalty the defendant could face. *Id.* The court found that this amount was consistent with the requirement that ""a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty."" *Id.* (quoting *Campbell*, 538 U.S. at 417).

In this case, the maximum fine a corporation could face for manslaughter was $50,000.[4] *See Williams*, 127 P.3d at 1179. Thus, a punitive damages award of $79.5 million does not satisfy the presumptive limit approach to the third guidepost. This award also fails to provide Petitioner with adequate notice of the monetary punishment it might face in the form of punitive damages because of its wrongful conduct.

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[3] While the court also noted that Exxon personnel could have faced prison sentences, *see In re the Exxon Valdez*, 296 F. Supp. 2d at 1108, this factor does not seem crucial because the civil and criminal monetary penalties already exceeded the amount of punitive damages. Despite its conclusion that the $5.1 billion award passed constitutional muster, the district court followed the Ninth Circuit's instruction and reduced the punitive damages award to $4.5 billion.

[4] In light of the Oregon Supreme Court's opinion, we assume, arguendo, that manslaughter is the appropriate analog. *See also infra* note 6.

C. Looking To Criminal And Civil Monetary Penalties As A Limit For Punitive Damages Provides Appropriate Deference To Legislative Decisions.

Using statutory maximum fines as a presumptive limit on punitive damages is also in line with the basic tenets of federalism, moving law-making decisions from judges and juries back to the legislature. *Cf. Campbell*, 538 U.S. at 422 ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."); *see also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432-33 (2001). Indeed, this is one of the reasons why the presumptive limit approach can be so helpful in ensuring constitutional punitive damages awards. *See* Victor E. Schwartz et al., *Selective Due Process: The United States Supreme Court Has Said That Punitive Damages Awards Must Be Reviewed for Excessiveness, but Many Courts Are Failing to Follow the Letter and Spirit of the Law*, 82 Or. L. Rev. 33, 50 (2003) (stating the third guidepost "is the only one of the *Gore* Court's three criteria that ties the punitive damages verdict to broader policy judgments made by 'society,' as expressed through the legislature, as to what the appropriate punishment for the behavior at issue should be").

A state legislature should be free to choose how to pursue its interest in meting out punishment and achieving deterrence within its jurisdiction. This works to prevent arbitrary punitive damages awards that serve no legitimate state purpose. Finally, this approach allows state legislatures to take a more sophisticated approach. As such, they can achieve greater proportionality in punitive damages awards by addressing particular types of misconduct rather than depending on flat caps or multiplier caps that apply to all forms of misconduct

to control the award of punitive damages. *See* Chanenson & Gotanda, *supra*, at 486-87.

As noted above, the presumptive limit approach need not lead to small punitive damages awards. Legislatures may authorize, and some in fact have established, massive monetary penalties for certain conduct. *See, e.g., In re the Exxon Valdez*, 296 F. Supp. 2d at 1107-08 (comparing $5 billion punitive damages award to $5.1 billion criminal fine that defendant could face). If the Oregon legislature decides that $50,000 is too small a penalty for "extraordinarily reprehensible," *Williams*, 127 P.3d at 1181, conduct such as Petitioner's, it can amend its laws.[5] Until the legislature does so, however, courts should respect its judgment as to the appropriate monetary sanction. *See, e.g.*, Chanenson and Gotanda, *supra*, at 488-91 (discussing the impact of unusually low, unusually high or nonexistent legislatively set monetary punishments); Schwartz et al., *supra*, at 53-54 (discussing impact of low or nonexistent fines).

D. Setting The Third Guidepost As A Presumptive Limit On Punitive Damages Awards Would Simplify The Analysis And Create More Uniform Decisions While Still Retaining Flexibility.

Using a statutory maximum fine as a presumptive limit on punitive damages awards offers lower courts a simple and objective frame of reference. *See, e.g., Lincoln*, 340 F.3d at 294 (reducing punitive damages award to the maximum civil fine for comparable conduct and stating "a punitive damages award coextensive with the statutory maximum civil penalty

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[5] One potential salutary byproduct of adopting the presumptive limit approach may be to encourage criminal sentencing reform that takes non-incarcerative punishment more seriously. The American Bar Association has been encouraging just such a move for more than a decade. *See* American Bar Association, Criminal Justice Sentencing Standards 18-3.16 (History of Standard) (3d ed. 1994).

is reasonable and proportionate to the wrong committed"); *United States v. Big D Enters., Inc.*, 184 F.3d 924, 933-34 (8th Cir. 1999) (approving damages of $50,000 against each defendant because, among other things, the award did not exceed the maximum civil penalty permitted); *cf. In re the Exxon Valdez*, 296 F. Supp. 2d at 1107-10 (noting potential criminal liability could have amounted to $5.1 billion and thus court was "well satisfied that Exxon was fairly on notice that . . . the company could face in excess of $5 billion in criminal and civil penalties for recklessly spilling crude oil into Prince William Sound" and thus "a $5 billion [punitive damages] award was justified and is not grossly excessive so as to deprive Exxon of fair notice—its right to due process").

A presumptive limit approach to the third guidepost does not require judges to turn to subjective beliefs. Given this common starting point, courts are more likely to treat roughly comparable punitive damages awards, based on roughly comparable conduct within a particular jurisdiction, in a roughly more uniform fashion. This approach brings much needed structure to the excessiveness evaluation, providing guidance that lends itself to a more meaningful and principled evaluation of punitive damages awards. Yet not only does the court still have the flexibility of the first two guideposts, but the presumptive nature of this test permits some play in the joints for the unusual circumstance.

II. COMPARING PUNITIVE DAMAGES AWARDS TO NON-MONETARY CRIMINAL PUNISHMENTS IS FUNDAMENTALLY FLAWED.

The Oregon Supreme Court erred by relying on the potential sanction of incarceration for the conduct at issue to justify the size of the punitive damages award. *See Williams*, 127 P.3d at 1179-80. This approach could lead to the near-total evisceration of the third guidepost. The possibility of incarceration fails to provide constitutionally meaningful notice of

punitive damages. Furthermore, incarceration and monetary fines are largely incommensurable. Only the maximum criminal or civil monetary sanctions provide a useful and appropriate frame of reference for evaluating the third guidepost.

While *Gore* indicated that criminal sanctions generally, which may include incarceration as well as fines, are relevant in considering the third guidepost, *see Gore*, 517 U.S. at 583 (citing *Haslip*, 499 U.S. at 23), this Court has never fully explored the role of incarceration and has, logically, spent more energy discussing comparable monetary penalties. At most, possible incarceration may be a general indication of the seriousness with which the state legislature views a crime. However, this broad consideration is also part of the first *Gore* guidepost, the reprehensibility of the defendant's behavior. *See, e.g., Gore*, 517 U.S. at 575-76. The third guidepost can and should mean more.

In this case, the Oregon Supreme Court stated that "the possibility of severe criminal sanctions . . . put [Petitioner] on notice that Oregon would take such conduct very seriously." *Williams*, 127 P.3d at 1179. This Court's Due Process analysis is not satisfied by such a crude test in which the mere potential of an incarcerative criminal sanction is apparently sufficient to authorize limitless punitive damages.[6] That a

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[6] In the case at bar, the petitioner's corporate status provides an additional complication concerning the relevance of incarceration as a criminal punishment. Obviously, prison sentences do not apply to corporations. *See In re the Exxon Valdez*, 296 F. Supp. 2d at 1108 (recognizing "it is not possible to imprison a corporate defendant in a criminal case"). The only comparable criminal sanction that would have applied to the petitioner was a criminal fine of up to $50,000 or a sum "not exceeding double the amount of the corporation's gain from the commission of the offense." Or. Rev. Stat. §§ 161.655(1)(a), 161.655(3) (2005). While there is no indication in the Oregon Supreme Court opinion that respondent presented evidence concerning the latter, it is likely that the petitioner's gain from the alleged felony against Jesse Williams, even when doubled, would not have come close to the $79.5 million punitive

state takes certain conduct "very seriously" is a general indication of offense severity, but it does not indicate the *amount* of punitive damages a corporation could face for engaging in such conduct. *See DiSorbo v. Hoy*, 343 F.3d 172, 187-88 (2d Cir. 2003) (holding that even though defendant could face prison, he was not on notice that he could face $1.275 million in punitive damages given that maximum fine for his conduct was $1,000).

Indeed, incarceration is not meaningfully comparable to punitive damages. For example, there is the practical problem of comparing the potential *length* of a prison sentence to the *amount* of a punitive damages award. For purposes of the third guidepost, a prison sentence cannot be helpfully compared to a monetary figure because nontrivial deprivations of liberty will almost always be a more severe penalty than deprivations of money. *See* Chanenson & Gotanda, *supra*, at 479-80; *see also Community Bank, Ellisville, Miss. v. Courtney*, 884 So.2d 767, 787 (Miss. 2004) (Easley, J. dissenting) (stating that "imprisonment is a loss of freedom and arguably by most standards a more valuable possession than punitive damage awards"). The difficulty of translating prison sentences into punitive damages awards is apparent in courts' different conclusions on the subject. *Compare Ziemba v. Armstrong*, No. 3-98-cv-2344, 2006 WL 1405576, at *7 (D. Conn. May 17, 2006) (stating that "one year of imprisonment may well be equivalent to a financial loss of $150,000"), *with*

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damages award. *See id.*; Or. Rev. Stat. §161.625(4) (2005) (stating that the defendant's gain for purposes of section 161.655(3) "means the amount of money or the value of property derived from the commission of the felony, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authorities before the time sentence is imposed"). The maximum monetary fine for an individual was $250,000. Or. Rev. Stat. §161.625(1)(c) (2005). The Court need not determine which fine amount presents the presumptive limit for purposes of the third guidepost because the punitive damages award is dramatically higher regardless.

Aldworth Co. v. England, 622 S.E.2d 367, 373 (Ga. Ct. App. 2005) (reasoning that because of a possible one-year prison sentence, "we cannot say that the jury went too far when it decided to punish [the defendant] to the extent of $1 million in punitive damages"), *cert. granted by Ga. S. Ct.*, http://www.gasupreme.us/granted_certs/GC_06.html#s06c0310 (appealing other issues).

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Oregon should be reversed.

Respectfully submitted,

ROBERT D. FOX *
JOHN F. GULLACE
MANKO, GOLD, KATCHER & FOX, LLP
401 City Avenue, Suite 500
Bala Cynwyd, PA 19004
(484) 430-5700

* Counsel of Record

Counsel for Amicus Curiae

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In The
Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

**On Writ Of Certiorari To
The Supreme Court Of Oregon**

BRIEF OF HENRY H. DRUMMONDS, CAROLINE FORELL, KATHY T. GRAHAM, LAIRD C. KIRKPATRICK, RONALD B. LANSING, SUSAN F. MANDIBERG, JAMES MOONEY, AND DOMINICK R. VETRI, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

STEVEN C. BERMAN
STOLL STOLL BERNE LOKTING
& SHLACHTER PC
209 SW Oak Street
Suite 500
Portland, OR 97204
(503) 227-1600
Counsel of Record

DAVID F. SUGERMAN
PAUL & SUGERMAN, PC
520 SW Sixth Avenue
Suite 920
Portland, OR 97204
(503) 224-6602

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

This *amicus* brief addresses generally the first question that the Court accepted for review.

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I. INTRODUCTION

A. Statement of Interest of *Amici Curiae*

Oregon is home to three law schools: Lewis and Clark Law School, University of Oregon School of Law, and Willamette University School of Law. *Amici curiae* Henry H. Drummonds, Professor of Law, Lewis and Clark Law School; Caroline Forell, Clayton R. Hess Professor of Law, University of Oregon School of Law; Kathy T. Graham, Associate Dean for Academic Affairs and Professor of Law, Willamette University College of Law; Laird C. Kirkpatrick, Orlando John & Marion H. Hollis Professor of Law, University of Oregon School of Law; Ronald B. Lansing Professor of Law, Lewis and Clark Law School; Susan F. Mandiberg Professor of Law, Lewis and Clark Law School; James Mooney, Wallace & Ellen Kaapcke Professor of Business Law, University of Oregon School of Law; Dominick R. Vetri, B.A. Kliks Professor of Law, University of Oregon School of Law (collectively "the Oregon Professors *amici*") are professors from Oregon's law schools. The Oregon Professors *amici* have no financial interest in the outcome of this case. However, as Oregonians and academics who educate the next generation of Oregon lawyers and judges, the Oregon Professors

amici have a strong interest in preserving and protecting the integrity and reputation of the Oregon courts.[1]

The Oregon Professors *amici* file this brief to refute the unfounded and misplaced arguments asserted by *amici curiae* Oregon Forest Industries Council, Oregon Grocers Association, National Federation of Independent Business/Oregon Chapter, Oregon Restaurant Association, Associated Oregon Industries, and Strategic Economic Development Corporation (the "Oregon Industry *amici*"). In particular, the Oregon Professors *amici* address the Oregon Industry *amici*'s mischaracterization of the Oregon appellate judiciary as rogue courts that "ignore or avoid" the Court's jurisprudence regarding post-verdict review of punitive damages awards. Oregon Industry *amici* Brief at 17. The Oregon appellate courts have adhered faithfully to the jurisprudence set forth in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) and its progeny. In this case and the handful of other post-*Oberg* cases involving post-verdict review of jury punitive damage awards addressed by the Oregon appellate courts, those courts have applied the law properly to ensure that no defendant is denied due process of law. There is no basis for the Oregon Industry *amici*'s unfounded assertion that the Oregon appellate courts are "not listening" to "what this Court has tried to do to limit large punitive damages awards over the last 20 years." Oregon Industry *amici* Brief at 16.

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[1] Through counsel, the Oregon Professors *amici* certify: 1) no counsel for any party wrote all or any part of this brief; 2) the Oregon Trial Lawyers' Association made a monetary contribution to fund the costs of printing and serving this brief; and 3) pursuant to Rule 37.3(a), all parties have consented to this brief. Letters establishing consent have been lodged with the Clerk of the Court.

B. Summary of Argument

The Oregon courts have faithfully followed and applied this Court's emerging due process jurisprudence as it relates to the adjudication of punitive damage claims. In response to this Court's decision in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994), the Oregon Supreme Court overruled inconsistent case law and limited the application of State constitutional prohibitions on re-examination of jury verdicts. In the same era, the Oregon Legislative Assembly enacted a host of statutory reforms designed to codify clear and explicit standards for the adjudication and review of punitive damage awards.

Much of what troubles the Oregon Industry *amici* is a lack of historical understanding. The current state of the law did not spring in whole from the *Oberg* case. Instead, the Court's jurisprudence has developed and emerged, and the lower courts have acted in response. The Oregon courts have remained faithful to the various standards as they have developed.

Cases that span changes in this Court's jurisprudence highlight the dynamic. Two cases provide the best illustration: *Bocci v. Key Pharmaceuticals, Inc.*, 158 Or. App. 521, 974 P.2d 758 (1999), *vacated and remanded*, 332 Or. 39, 22 P.3d 758, *on remand*, 178 Or. App. 42, 35 P.3d 1106 (2001), *cert. granted, vacated and remanded*, 538 U.S. 974 (2003), *on remand*, 190 Or. App. 407, 79 P.3d 908 (2003); and *Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 27 P.3d 1092 (2001), *rev. den.*, 334 Or. 260, 47 P.3d 486 (2002), *cert. granted, vacated and remanded*, 538 U.S. 974 (2003), *on remand*, 190 Or. App. 172, 78 P.3d 570 (2003). Both were originally

decided by Oregon appellate courts applying the standards set forth in *BMW v. Gore*, 517 U.S. 559 (1996). Both were on appeal for so long that the law changed midstream with this Court's later case of *State Farm v. Campbell*, 538 U.S. 408 (2003). And in both cases, the Oregon courts ultimately applied *Campbell* and reduced the punitive damages on remand.

It appears that Oregon Industry *amici* want a fixed ratio that sets an outer limit on punitive damage awards. With good reason, this Court has declined set such a rigid limit in the past. Nothing in the Oregon Industry *amici* brief suggests any basis for departure from the Court's view that punitive damages should not be limited to a fixed ratio.

II. ARGUMENT

A. Introduction

According to Oregon Industry *amici*, the Oregon Supreme Court and Court of Appeals are ignoring this Court's due process jurisprudence relating to punitive damages. The argument rests on a selective view of history and case law. As this Court has developed its punitive damages due process jurisprudence, the Oregon courts have responded by adopting and applying the developing case law. Oregon Industry *amici* use this fantastic image of a "rogue court" in order to encourage this Court to do what it repeatedly said it would not and that is to set a fixed limit ratio on punitive damages awards. The arguments are without merit, as the Oregon courts have remained faithful to due process requirements in this decade of changing law.

B. The Oregon Appellate Courts Have Adhered Strictly to this Court's Application of the Due Process Clause to Post-Verdict Review of Punitive Damages Awards.

1. *Oberg* and the Oregon Supreme Court's Response

The Court's determination that the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States requires post-verdict review for excessiveness of a jury's award of punitive damages arose out of the Oregon Supreme Court's decision in *Oberg v. Honda Motor Co., Ltd.*, 316 Or. 263, 851 P.2d 1084 (1993). In *Oberg*, the plaintiff had suffered extensive injuries as a result of the defendants' negligent manufacturing, distributing and selling of an inherently and unreasonably dangerous product. A jury awarded the plaintiff $919,390 in compensatory damages and $5,000,000 in punitive damages. 316 Or. at 266, 851 P.2d at 1086. On appeal, the Oregon Supreme Court rejected the defendants' argument that they were entitled to post-verdict review, for excessiveness, of the jury's punitive damages award. 316 Or. at 275-289, 851 P.2d 1091-1099.

The Court granted *certiorari* and reversed. 512 U.S. 415 (1994). The Court began its analysis by recognizing that "[e]very other State in the Union affords postverdict judicial review of the amount of a punitive damages award." 512 U.S. at 427-428. The Court stated that Oregon's "lonely eminence is this regard" was an "abrogation of a well-established common law protection against arbitrary deprivations of property" that presumptively resulted in a due process violation. 512 U.S. at 427 (internal quotation marks omitted; citations omitted). The Court concluded that other extant Oregon law safeguards intended

to ensure against improper deprivations of property failed to meet the requirements of due process. 512 U.S. at 432-433. In *Oberg*, the Court specifically acknowledged that it was not addressing the "more difficult question of what standard of review is constitutionally required." 512 U.S. at 432 n.10. However, the Court endorsed the standard it previously had articulated as a due process requirement for review of criminal punishments in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979), "whether no rational trier of fact could have reached the same verdict." *Oberg*, 512 U.S. at 432, n.10.

On remand, the Oregon Supreme Court conducted a post-verdict review of the jury's punitive damages award and applied the rational juror standard explicitly stated by the Court. *Oberg v. Honda Motor Co., Ltd.*, 320 Or. 544, 551, 888 P.2d 8, 12 (1995) ("*Oberg II*"). The court concluded that the punitive damages award was within the range that a reasonable juror could award and affirmed the jury's punitive damages verdict. 320 Or. at 555, 888 P.2d at 14. The defendants' petition for *certiorari* was denied. *Honda Motor Co., Ltd. v. Oberg*, 517 U.S. 1219 (1996).

Oberg II led to a fundamental change in Oregon State constitutional law. To give effect to this Court's rulings, the Oregon Supreme Court overruled in part longstanding State constitutional precedent. *Oberg II*, 320 Or. at 548-49, 888 P.3d at 10 (*overruling in part, Van Lom v. Schneiderman*, 187 Or. 89, 210 P.2d 461 (1949)). In the same case, the Oregon Supreme Court held that the Oregon Constitution's prohibition on re-examination of jury findings could not be applied to punitive damage awards in light of Fourteenth Amendment Due Process limits articulated by this Court. *Oberg II*, 320 Or. at 548-49, 888 P.3d at 10.

In their brief, the Oregon Industry *amici* harshly criticize the Oregon Supreme Court and the Oregon Court of Appeals for their post-*Oberg* application of the "rational juror" standard. *See, e.g.*, Oregon Industry *amicus* Brief at 6 (referring to this Court's "rational juror" standard as "very deferential" and the Oregon Supreme Court's application of that standard as "*Oberg II*'s rule of complete deference to jury awards"). The Oregon Industry *amici* assert that the Oregon Supreme "[C]ourt's message to trial courts was clear: defer to the jury's punitive damages decisions." Oregon Industry *amici* Brief at 7. The Oregon Industry *amici* overlook the fact that the Oregon Supreme Court and Oregon Court of Appeals were applying the legal standard this Court set forth in *Oberg*.

2. *Oberg* and the Oregon Legislature's Response

After the Oregon Supreme Court adopted this Court's "rational juror" standard for post-verdict review of punitive damages awards, the Oregon Legislative Assembly enacted additional limitations regarding how and when punitive damages could be awarded. In the wake of *Oberg*, the Oregon legislature codified specific standards for recovery of punitive damages and court review of punitive damage awards. 1995 Or. Laws, ch. 688, § 2.[2] Codifying longstanding common law standards, the statute limits punitive damages to cases in which a plaintiff proves by clear and convincing evidence that a defendant "has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has

[2] Originally codified at Or. Rev. Stat. § 18.537; renumbered in 2003.

acted with a conscious indifference to the health, safety and welfare of others." Or. Rev. Stat. § 31.730.[3] All jury awards of punitive damages must be reviewed by the trial court "to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole." Or. Rev. Stat. § 31.730(2). Finally, an award of punitive damages may be reduced, if it is determined to be excessive, or if a defendant establishes that the defendant has taken "reasonable" remedial measures to prevent reoccurrence of the conduct that gave rise to the claim for punitive damages. Under such circumstances, the reviewing court must consider any previous punitive damages awards against the same defendant for the same conduct. Or. Rev. Stat. § 31.730(3).

But the protections are much broader than the statutory review provisions. Plaintiffs cannot state a claim for punitive damages without leave of the court. Or. Rev. Stat. § 31.725(2). Before allowing a party to seek punitive damages, the trial court must conclude that sufficient admissible evidence exists such that a jury could find that the defendant acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others. Or. Rev. Stat. § 31.725(2) and § 31.730(1). Further, a plaintiff seeking punitive damages may not obtain discovery of the financial condition of the defendant until it has met the preliminary burden. Or. Rev. Stat. § 31.725(6).

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[3] Oregon's clear and convincing standard *exceeds* the requirements of due process. *Pacific Mutual Life Ins. Co. v. Haslip*, 449 U.S. 1, 23 n.11 (1991).

The statutory revisions come on the heels of pre-existing requirements that apply in civil cases. The broad protections include specific criteria in product liability cases that must be set forth in jury instructions in punitive damage cases. Or. Rev. Stat. § 30.925(2). Further, no plaintiff may pursue damages in excess of the amounts sought in the prayer in the complaint. *See Wiebe v. Seely Administrator*, 215 Or. 331, 357, 335 P.2d 379 (1959); Or. R. Civ. P. 18B. Finally, judicial review of the sufficiency of the evidence supporting the claim for punitive damages remains in effect. The Oregon courts will vacate punitive damage awards that lack evidentiary support. *See, e.g., Northwest Natural Gas Co. v. Chase Gardens*, 328 Or. 487, 490-491, 982 P.2d 1117, 1120 (1999).

After the Court's decision in *Oberg*, both the Oregon appellate courts and legislature critically examined Oregon law and acted to ensure that Oregon law complied with the requirements of the Due Process Clause. The Oregon requirements far exceed due process standards in that they attach before filing, during the case, and after verdict.

The Oregon Industry *amici*'s attempt to portray Oregon as a state where a defendant "risks excessive punitive damages jury awards without any recourse to constitutionally required meaningful appellate review" (Oregon Industry *amici* Brief at 17) falls flat. Oregon law provides extensive protections to defendants before, during and after trial.

3. Oregon Law in the Post-*Gore* Era

The Oregon Industry *amici* argue that Oregon appellate courts have ignored the standards set in *BMW v. Gore*, 517 U.S. 559 (1996) and instead have hewed a

unique Oregon standard. The argument requires suspension of critical thinking, both historical and legal. For years, this Court articulated no standards that applied to lower court review of punitive damage claims. The first statement of any standard – *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) – provided limited guidance to the States. As this Court's jurisprudence developed, it used later cases to more explicitly delineate the standards. *See, e.g.*, *Gore*, 517 U.S. at 568 (certiorari granted "to illuminate" standards that identify constitutionally excessive awards).

Oregon Industry *amici* cite a handful of cases considered by the Oregon appellate courts after this Court decided *Oberg*. Oregon Industry *amici* Brief at 6-15. Discussing those cases, and looking only at the ratio of punitive damages to actual damages, the Oregon Industry *amici* erroneously conclude that no "meaningful post-verdict review of punitive damages awards" occurs in Oregon. *Id.* at 11. The cases do not support the Oregon Industry *amici*'s argument. Each of the cases demonstrates that the Oregon appellate courts have adhered to the guidance provided by this Court.

In the era between *Gore* and *State Farm v. Campbell*, 538 U.S. 408 (2003), the Oregon appellate courts diligently applied the *Gore* standards in the cases that came before them. Although the Oregon Industry *amici* claim to be distraught by the Oregon appellate courts' analyses in those cases, what Oregon Industry *amici* truly are upset about are the results. The Oregon Industry *amici* cite a number of cases in the interim period between *Gore* and *Campbell* and suggest that something is wrong with how the Oregon appellate courts decided those cases. Even before *State Farm*, virtually all Oregon cases met the

presumptively acceptable single-digit multiplier standard discussed by the Court years later. *See, e.g.*, *Lakin v. Senco Products, Inc.*, 329 Or. 62, 83-84, 987 P.2d 463, 475-476 (1999) (ratio of punitive damages to compensatory damages less than 1:1); *see also Purcell v. Asbestos Corp. Ltd.*, 153 Or. App. 415, 959 P.2d 89 (1998), *rev. den.*, 329 Or. 438, 994 P.2d 126 (1999) (ratio of less than 2:1); *Axen v. American Home Products Corp.*, 158 Or. App. 292, 974 P.2d 224, *adhered to on recons.*, 160 Or. App. 19, 981 P.2d 340, *rev. den.*, 329 Or. 357, 994 P.2d 124, *cert. den.*, 528 U.S. 1136 (2000) (plaintiff blinded by dangerous drug; ratio less than 10:1); *Kraemer v. Harding*, 159 Or. App. 90, 976 P.2d 1160, *rev. den.*, 329 Or. 357 (1999) (school bus driver falsely accused of sexually abusing students; ratio less than 1:1); *MacCrone v. Edwards Center, Inc.*, 160 Or. App. 91, 980 P.2d 1156 (1999), *vacated and remanded*, 332 Or. 41, 22 P.3d 758, *adhered to on remand*, 176 Or. App. 355, 31 P.3d 513 (2001), *rev. den.*, 334 Or. 190 (2002) (plaintiff left to endure assault and strangulation by patient at care center; supervisor refused to provide assistance or protection; ratio less than 5:1); *Cantua v. Craeger*, 169 Or. App. 81, 7 P.3d 693 (2000) (statutory employment discrimination and sex harassment claim with ratio of 20:1; however, compensatory damages for lost earnings totaled $500, with punitive damages of $10,000).

4. Oregon Law Post-*Campbell*

The Oregon Industry *amici*'s emphasis on pre-*Campbell* cases diminishes their argument, for account must be taken of how the Oregon courts applied *Campbell*. The Oregon Industry *amici* make much of *Parrott v. Carr Chevrolet, Inc.*, 156 Or. App. 275, 965 P.2d 440 (1998), *rev'd.*, 331 Or. 537, 17 P.3d 473 (2001), and the pre-*Campbell* cases

of *Bocci v. Key Pharmaceuticals, Inc.*, 158 Or. App. 521, 974 P.2d 758 (1999), *vacated and remanded*, 332 Or. 39, 22 P.3d 758, *on remand*, 178 Or. App. 42, 35 P.3d 1106 (2001), *cert. granted, vacated and remanded*, 538 U.S. 974 (2003), *on remand*, 190 Or. App. 407, 79 P.3d 908 (2003) (vacated for reconsideration in light of *Campbell*; punitive damages reduced on remand to ratio of 7:1); *Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 27 P.3d 1092 (2001), *rev. den.*, 334 Or. 260, 47 P.3d 486 (2002), *cert. granted, vacated and remanded*, 538 U.S. 974 (2003), *on remand*, 190 Or. App. 172, 78 P.3d 570 (2003) (vacated for reconsideration in light of *Campbell*; punitive damages reduced on remand to 4:1 ratio).

The argument fixates on the past. In fact, the Oregon courts have faithfully applied the due process standards and have responded appropriately as this Court articulated the standards. More important, the argument discards facts that do not fit. As the Oregon Supreme Court explained in the opinion under review, its opinion in *Parrott* was superseded in part by *Campbell*. *Williams v. Philip Morris, Inc.*, 340 Or. 35, 55, 127 P.3d 1165, 1177 (2006). The Oregon Industry *amici* invite this Court to act based upon legal history that does not represent the current state of Oregon law. At issue is whether Oregon law and the Oregon courts comport with due process requirements. They do.

The Oregon Industry *amici* argue that punitive damages jury decisions "are rarely disturbed (and have never been disturbed by the Oregon Supreme Court)." Oregon Industry *amici* Brief at 15. The argument is overstated in several respects. First, punitive damages are rare enough that few cases qualify for consideration. More to the point, roughly half of the punitive damages jury

verdicts appealed in Oregon after *Gore* have been reduced or reversed by the Oregon appellate courts. *See, e.g., Bocci*, 189 Or. App. 349, 76 P.3d 669 (2003) (personal injury case where plaintiff was awarded $500,000 in actual damages and Court of Appeals reduced $22.5 million punitive damages award to $3.5 million); *Waddill*, 190 Or. App. 172, 78 P.3d 570 (personal injury case where the plaintiff incurred $134,472 in actual damages and Court of Appeals reduced $1 million punitive damages award to $403,416); *Goddard v. Farmers Insurance Co. of Oregon*, 202 Or. App. 79, 120 P.3d 1260 (2005), *rev. granted*, __ Or. __, __ P.3d __ (September 6, 2006) (Court of Appeals holding that, in a personal injury case, punitive damages award of $20 million was excessive when actual damages were $863,274 and holding that a 3:1 ratio was the maximum that could comport with due process based on the facts of that case). *See also Stranahan v. Fred Meyer*, 331 Or. 38, 11 P.3d 228 (2000) (on the plaintiff's appeal of the trial court's reduction of punitive damages from $2 million to $375,000, where actual damages were $125,000, Oregon Supreme Court reversed the underlying jury verdict on other grounds).

Oregon Industry *amici*'s arguments disintegrate in the face of the decided cases. Oregon courts repeatedly have established that they do in fact act to reduce punitive damage awards that are excessive.

The Oregon Industry *amici*'s criticism of the Oregon Supreme Court is misguided in another respect. The Oregon Supreme Court is, with exceptions not relevant here, a court of discretionary review. ORAP 9.05. The Oregon Supreme Court will not review a lower court's decision unless a party files a petition for review and successfully articulates an issue of significance beyond the facts of the case that merits review. ORAP 9.07; ORAP

9.20. Oregon Industry *amici* overstate their argument when they proclaim that punitive damage awards, "have *never* been disturbed by the Oregon Supreme Court. . . ." Oregon Industry *amici* Brief at 15 (emphasis in the original). But in at least four cases that they argue support the proposition, the defendants did not seek review of the award.[4] The Oregon Supreme Court could not act in those cases, and thus the universe of cases contracts. In another three cases where review was denied by the Oregon Supreme Court, the punitive damages awarded were well within the single-digit ratio subsequently deemed presumptively constitutional by this Court in *Campbell*.[5] In the cases where review was sought and denied, it is not clear whether the defendant raised the issue of excessiveness of the award of punitive damages.

At bottom, Oregon Industry *amici* dislike the result in *Williams*. The record demonstrates that Philip Morris' conduct is breathtakingly reprehensible and destructive. The Oregon Industry *amici* would not deliberately engage in conduct of this nature. For that reason, the critique that they offer is somewhat hard to fathom. The lesson of *Williams* is simple: a rogue corporate entity that exploits

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[4] Those cases are: *Cantua v. Creager*, 169 Or. App. 81, 7 P.3d 693 (2000), *Blume v. Fred Meyer, Inc.*, 155 Or. App. 102, 963 P.2d 700 (1998), *Bocci* and *Waddill*.

[5] Those cases are: *MacCrone v. Edwards Center, Inc.*, 176 Or. App. 355, 31 P.3d 513 (2001) (upholding a 4.5:1 punitive damages ratio), *review denied*, 334 Or. 190, 47 P.3d 485 (2002); *Kraemer v. Harding*, 159 Or. App. 90, 976 P.2d 1160 (upholding a 0.6:1 punitive damages ratio), *review denied*, 329 Or. 357, 994 P.2d 124 (1999); *Purcell v. Asbestos Corporation, Ltd.* (1998) (upholding a 1.67:1 punitive damages ratio), *review denied*, 329 Or. 438, 994 P.2d 126 (1999).

biological frailties in the human species may be punished when its misconduct causes widespread disease and death.

The Oregon Professors *amici* are not aware of any Oregon industry that knowingly and intentionally has shown such a callous disregard for human life and welfare as the tobacco industry and its market leader, Philip Morris. Under Oregon and federal law, responsible corporate citizens cannot be subjected to punitive damages awards similar (either in size, or as a ratio to actual damages) to the award made in this case. Businesses are not threatened by the verdict in this case.

C. The Oregon Industry *Amici*'s Push for Definitive Ratios is Inconsistent with the Court's Jurisprudence.

The gravamen of the Oregon Industry *amici*'s brief is that Oregon law "exposes businesses in the state to arbitrary and unreasonable punitive damages awards, particularly in product liability cases." Oregon Industry *amici* Brief at 16. From that premise, the Oregon Industry *amici* demand that the Court set a definitive ratio of punitive damages to compensatory damages.

The Court repeatedly has rejected the rule proposed by the Oregon Industry *amici*, that due process requires a defined ratio or cap between compensatory damages and punitive damages. In *Pacific Mutual Life Ins. Co. v. Haslip*, 449 U.S. 1, 18 (1990), the Court explained "we *cannot* [] draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." (Emphasis added). In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993) the Court again reiterated that it has

"eschewed an approach that concentrates entirely on the relationship between actual and punitive damages" and upheld a punitive damages award that exceeded by a factor of 526 the plaintiffs' actual damages. In *Gore*, the Court recognized that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award" and "reiterated our rejection of a categorical approach." 517 U.S. at 582. But, the Court also acknowledged that in a non-personal injury case, a 500:1 ratio of punitive damages to actual damages was one potential indicia of excessiveness. *Gore*, 517 U.S. at 583. It was not until the recent decision in *Campbell* that the Court began to articulate with specificity a loose outer range for punitive damage awards in most (but not all) cases. The Court again "decline[d] . . . to impose a bright-line ratio which a punitive damages award cannot exceed." However, after examining its prior jurisprudence, the Court observed that "*few* awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." 538 U.S. at 425 (emphasis added). The Court explicitly stated that "these ratios are *not binding*, they are instructive." *Id.* at 425 (emphasis added). Nonetheless, the Court concluded that "single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution than awards with ratios in the range of 500 to 1 or, in this case, of 145 to 1." *Id.* at 425 (emphasis added; citations omitted).

What the Court repeatedly has said regarding ratios is that they may provide guidance as to whether an award of punitive damages is constitutionally permissible. There is no bright line. As Judge Posner properly recognized in

Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003), adherence to a bright-line ratio would "enable the defendant to commit the offensive act with impunity provided that he was willing to pay." With a bright-line ratio restricting punitive damages, a tortfeasor would do what Philip Morris did in Oregon for decades and weigh the benefits of selling an addictive drug that, when properly used, causes extensive and extreme health risks against the possible costs of a restricted judgment against it. Punitive damages are intended to prevent product manufacturers from weighing potential financial profits against loss of human health and, in the case of Philip Morris, human life. An award of punitive damages "thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution." *Id.* at 677.

The Oregon Industry *amici*'s apparent dispute with the Oregon appellate courts is that those courts do not remit every punitive damages verdict in every case that comes before them. However, post-verdict review does not insure post-verdict reduction.[6]

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[6] Oregon Industry *amici* imply that the uncertainties arising from punitive damage exposure threaten Oregon businesses. Oregon Industry *amici* Brief at 3). To the contrary, the Oregon economy is healthy, with steady employment and better-than-expected tax revenues. Due to the State's healthy economy, the citizens and businesses of Oregon are scheduled to receive tax refunds at unprecedented levels. "Oregon's IOU to Taxpayers: $1.3 billion," *The Oregonian*, at 1, col. 1 (Sept. 1, 2006).

III. CONCLUSION

Oregon Industry *amici* got it wrong. The Oregon courts have remained faithful to this Court's evolving punitive damage due process jurisprudence.

Oregon Industry *amici* inexplicably seek to defend corporate misconduct that is indefensible. It is difficult, if not impossible, to come up with comparisons when assessing the fraud at issue in this case. No other segment of the legal market economy has intentionally manipulated an addictive substance to build and maintain its business, and few other businesses have worked so hard to conceal their misconduct. In that respect, the scope of the misconduct is incomparable. This Court should affirm the judgment.

Dated this 15th day of September, 2006.

Respectfully submitted,

STEVEN C. BERMAN
STOLL STOLL BERNE LOKTING & SHLACHTER PC
209 SW Oak Street
Suite 500
Portland, OR 97204
Telephone: (503) 227-1600

DAVID F. SUGERMAN
PAUL & SUGERMAN, PC
520 SW Sixth Avenue
Suite 920
Portland, OR 97204
Telephone: (503) 224-6602

Attorney for Amici

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In the

Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari
To the Supreme Court of Oregon

BRIEF AMICUS CURIAE OF PROFESSORS KEITH N. HYLTON, KENNETH G. DAU-SCHMIDT, MARK F. GRADY, JEFFREY L. HARRISON, MARK G. KELMAN, AND THOMAS ULEN IN SUPPORT OF RESPONDENTS

CHRISTINE SPAGNOLI
GREENE BROILLET & WHEELER, LLP
100 Wilshire Blvd., 21st Fl.
P.O. Box 2131
Santa Monica, CA 90407
(310) 576-1200

RONALD SIMON*
SIMON & ASSOCIATES
1707 N Street, N.W.
Washington, DC 20036
(202) 429-0094

*Counsel of Record

Counsel for Amicus Curiae

(Additional Counsel Listed on Inside Cover)

ED BELL
BELL LAW FIRM
232 King Street
Georgetown, SC 29442
(843) 546-2408

ROGER S. BRAUGH, JR.
SICO WHITE & BRAUGH, LLP
900 Frost Bank Plaza
802 N. Carancahua St.
Corpus Christi, TX 78470
(361) 653-3300

PATRICK CARR
CARR & CARR
4416 S. Harvard Ave.
Tulsa, OK 74135
(918) 747-1000

RICHARD L. DENNEY
DENNEY & BARRETT, PC
870 Copperfield Drive
Norman, OK 73072
(405) 364-8600

JOHN ECHEVERRIA
ECHEVERRIA LAW FIRM
9432 Double R Blvd.
Reno, NV 89521
(775) 786-4800

W. HAMPTON KEEN
LYTAL REITER CLARK ET AL.
10th Floor, Northridge Centre
515 N. Flagler Dr.
West Palm Beach, FL 33401
(561) 655-1990

PETER M. KELLY
MOORE & KELLY, PC
1005 Heights Boulevard
Houston Texas 77008
(713) 529-0048

DANIEL RODRIGUEZ
RODRIGUEZ & ASSOCIATES, PLC
2020 Eye Street
Bakersfield, CA 93310
(661) 323-1400

G. LYNN SHUMWAY
6909 E. Greenway Parkway
Suite 200
Scottsdale, AZ 85254
(480) 368-0002

CHARLES SIEGEL
WATERS & KRAUS, LLP
3219 McKinney Avenue
Dallas, Texas 75204
(214) 357-6244

GERRY L. SPENCE
ROBERT A. KRAUSE
THE SPENCE LAW FIRM, LLC
15 South Jackson Street
P.O. Box 528
Jackson, WY 83001
(307) 733-7290

QUESTION PRESENTED

Amicus curiae will address the following question: Whether the Oregon Supreme Court correctly applied law and economics principles – specifically, deterrence theory – in affirming the punitive damage award in this case, or whether it mistakenly approved an irrational and excessive punitive damages judgment.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amici are law professors who specialize in law and economics, and university scholars who specialize in economic theory. Each has used law and economics theories and principles in writing about or studying recurrent controversies concerning punitive damages awards. *Amici* have an interest in providing the Court with an accurate assessment of how those principles apply to the award in this case. Short biographical sketches of each individual *amicus* follow.

Amicus Keith N. Hylton is the Paul J. Liacos Scholar in Law and a Professor of Law at Boston University School of Law (BUSL), where he has taught courses in antitrust, labor law, and torts since 1995. He is an honors graduate of Harvard College and the Harvard Law School, and earned a Ph.D. in Economics from the Massachusetts Institute of Technology (MIT). He joined the BUSL faculty after teaching for six years and receiving tenure at Northwestern University School of Law. Widely recognized in the area of law and economics, he has published more than 50 articles in American law journals and peer-reviewed law and economics journals, including *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L. J. 421 (1998). His textbook, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION, was published by Cambridge University Press in 2003. He has served as the Editor of the TORTS, PRODUCTS LIABILITY AND INSURANCE LAW ABSTRACTS journal since 1999, is Co-Editor of COMPETITION POLICY INTERNATIONAL, and is a current member of the American Law Institute (ALI). He also is a former director of the American Law and Economics Association (ALEA), a former

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[1] The parties have filed blanket written consents with the Clerk to the filing of amicus briefs in this case. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the amici curiae, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

chair of the Section on Torts and Compensation Systems of the Association of American Law Schools (AALS), a former chair of the AALS' Section on Antitrust and Economic Regulation, a former Secretary of the American Bar Association's Section on Employment and Labor Law, and a former member of the editorial board of the JOURNAL OF LEGAL EDUCATION.

Amicus Kenneth G. Dau-Schmidt is the Associate Dean for Research and the Willard and Margaret Carr Professor of Labor and Employment Law at the Indiana University School of Law. Since joining the Indiana University School of Law faculty in 1997, Professor Dau-Schmidt has taught an advanced seminar in law and economics and courses in antitrust, labor and employment law, and employee benefits law. Professor Dau-Schmidt received his bachelor's degree from the University of Wisconsin, Phi Beta Kappa, and earned master's and law degrees (Order of the Coif), and a Ph.D. from the University of Michigan. Prior to joining the Indiana University School of Law faculty, he taught at the University of Wisconsin Law School. Professor Dau-Schmidt is a nationally recognized scholar. He has published more than fifty articles, chapters, and book reviews, on subjects ranging from labor and employment law to the economic analysis of legal problems, including *Legal Prohibitions as More Than Prices: The Economic Analysis of Preference Shaping Policies in the Law*, in LAW & ECONOMICS: NEW & CRITICAL PERSPECTIVES (R. Malloy & C. Brun, Eds.). His scholarship has appeared in the Duke Law Journal and the law reviews of the University of Texas, and the University of Wisconsin, among many others. In 1991, he received the Scholarly Paper Award from the Association of American Law Schools for his work on the economic analysis of the criminal law as a preference-shaping policy. He also received awards from the School of Law for teaching excellence in 1998 and in 2003. Professor Dau-Schmidt was elected to the National Council of the American Association of University Professors (1993-96) and was appointed to

serve on both the Executive Committee (1994-96) and Litigation Committee (1993-02) of that organization. Professor Dau-Schmidt has served on the Executive Committee of the Association of American Law Schools' section on Labor and Employment Law (1990-91), the Industrial Relations Research Association's section on Labor and Employment Law (1998-99), and the Labor Law Group (2000-03). He has also served as the chair for the Association of American Law Schools' section on Law and Socio-economics (2002-03) and on that section's Executive Committee (2000-03).

Amicus Mark F. Grady is Professor of Law and Director of the Center for Law and Economics at the University of California, Los Angeles School of Law ("UCLA School of Law"). Professor Grady's research focuses on law and economics and he teaches torts, antitrust, and intellectual property at UCLA School of Law. He received his A.B. degree in Economics (1970) and his J.D. (1973) from UCLA. He held postdoctoral fellowships in law and economics at the University of Chicago Law School (1977) and the Yale Law School (1982). Professor Grady began his academic career at the University of Iowa School of Law, after working for the Federal Trade Commission and the United States Senate. In 1985, Professor Grady was appointed Professor of Law at Northwestern University. In the spring of 1990, he became the first John M. Olin visiting Professor of Law and Economics at Duke Law School. In 1992, he returned to UCLA to become Professor of Law. In 1997, he took leave from UCLA to become the third dean of the George Mason University School of Law, University Professor of Law, Chairman of the Law and Economics Center, and Principal Investigator of the law school's federally funded Critical Infrastructure Protection Project, which he founded. After a successful tenure at George Mason, Professor Grady returned to UCLA in 2004. Professor Grady is a founding trustee of the American Law and Economics Association and the author of numerous

books and articles on torts, intellectual property, antitrust, law and economics, and law and biology, including articles published in the Supreme Court Economic Review, the law reviews of the University of Virginia and the University of Pennsylvania, and *A New Positive Economic Theory of Negligence*, published in the Yale Law Journal. He has served as a consultant to President Ronald Reagan, presented policy papers at President William J. Clinton's White House, lectured to federal judges, given seminars to Congressional staff members, and testified to Congressional committees.

Amicus Jeffrey L. Harrison is Stephen C. O'Connell Chair and Professor of Law at the University of Florida College of Law, where he has taught Law & Economics, Antitrust, Contract, and Regulated Industries since 1983. From 1994 to 1999 he served as the Chesterfield Smith Professor of Law at the Law School. He received his Ph.D. in Economics and Business Administration from the University of Florida in 1970, and his J.D. from the University of North Carolina Law School in 1978, where served on the Law Review, won High Honors, and was awarded Order of the Coif. He is widely recognized in the field of Law and Economics and is the author of seven books and monographs (including LAW AND ECONOMICS: CASES, MATERIALS, AND BEHAVIORAL PERSPECTIVES (2002); UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS (4d ed., Matthew Bender, 2003) (with E.T. Sullivan); REGULATION AND DEREGULATION (2d ed. West, 1903) (with Morgan and Verkuil); MONOPSONY: ECONOMIC THEORY AND ANTITRUST POLICY (Princeton Univ. Press., 1993) (with R. Blair); and ECONOMIC REGULATION OF BUSINESS: CASES AND MATERIALS (West, 2d ed. 1985) (with Morgan and Verkuil). He is also the author of more than 40 law review or juried articles, comments, and book reviews, including articles published in the Michigan Law Review Northwestern Law Review, Cornell Law Review, Yale Journal on Regulation, Northwestern Journal on Regulation, George Washington Law Review, UCLA Law Review,

Wisconsin Law Review, Vanderbilt Law Review, the Journal of the Economics of Business, Journal of Law & Social Inquiry, and Antitrust Bulletin. He is a former Member of the Board of Editors of Law & Society Review and a former Chair of Association of American Law School's Section on Socioeconomics and the Law.

Amicus Mark G. Kelman is the William Nelson Cromwell Professor of Law and Vice Dean of Stanford Law School. Professor Kelman has taught courses on antidiscrimination law, including race and the law, criminal law and justice, distributive justice, employment discrimination, and property. In addition to being a long-time professor and researcher, Professor Kelman also has served as the academic coordinator, and academic associate dean of Stanford Law School. Before joining the Stanford Law School faculty in 1977, Professor Kelman was the director of Criminal Justice Projects for the Fund for the City of New York. Professor Kelman received a bachelor of arts degree from Harvard College in Social Studies, *summa cum laude* and Phi Beta Kappa. He received his law degree from Harvard Law School, *magna cum laude*. Professor Kelman is a prolific scholar whose jurisprudential interests range from law and economics to cognitive psychology. He has published several books, including A GUIDE TO CRITICAL LEGAL STUDIES (Harvard U.P. 1987), portions of which were reprinted in FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW, and STRATEGY OR PRINCIPLE? THE CHOICE BETWEEN REGULATION & TAXATION (U. Michigan P., 1999). He is also the author of numerous articles, published in peer review journals such as Philosophy & Public Affairs and in the Journal of Legal Studies, and in the law reviews of Stanford University, the University of Virginia, and the University of Southern California, among others. His scholarly articles include *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, and *Problematic Perhaps, But Not Irrational*, both of which were published in the Stanford Law Review.

Amicus Thomas S. Ulen is Swanlund Chair and Director, Illinois Program in Law and Economics at the University of Illinois College of Law. Professor Ulen also is a research affiliate of the Environmental Council, a member of the Campus Honors faculty, and holds positions in the Department of Economics and the Institute for Government and Public Affairs. Professor Ulen received a bachelor's degree from Dartmouth College, a master's degree from St. Catherine's College, Oxford, and a Ph.D. in Economics from Stanford University. Professor Ulen has served as a Visiting Professor at the University of Bielefeld, and as the Foreign Chair in International and Comparative Law at the University of Ghent, Belgium. He has also been a Visiting Professor in Belgium, Germany, Slovenia, and a Ford Foundation Professor in Shanghai, China. Professor Ulen's scholarship has examined a variety of issues related to economics, legal scholarship, and legal education, and has appeared in the law reviews of the University of Michigan and New York University, among others. His numerous publications include *Economic and Public Choice Forces in Federalism*, George Mason Law Review, and *The Growing Pains of Behavioral Law and Economics*, Vanderbilt Law Review. His book LAW AND ECONOMICS (with Robert Cooter), now in its fourth edition, has been translated into Chinese, Japanese, Spanish, Korean, French, and Russian. A prolific writer and researcher, Professor Ulen has contributed four entries—on regulation generally, quantity regulation, price regulation, and quality regulation—for the OXFORD ECONOMIC HISTORY OF THE UNITED STATES and a chapter for LAW AND IRRATIONAL BEHAVIOR (Francesco Parisi, ed., University of Chicago Press, 2003). Professor Ulen has served as a member of the editorial board of several professional journals and was a member of the founding Board of Directors of the American Law and Economics Association.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no dispute that the punitive damages award that was upheld by the Oregon Supreme Court in this case satisfies the most rigorous law and economic standards for rationality. The Court need not credit the analysis of the undersigned *amici* on this score; the fact that Petitioner's own *amici* – most notably law and economics scholars A. Mitchell Polinsky and Steven Shavell – have been unable to find anything economically amiss in the decision below speaks volumes.[2] To be sure, Professors Polinsky and Shavell have filed an amicus brief in support of Philip Morris in this case, just as they filed one in support of the Petitioner in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).[3]

Significantly, however, unlike the Polinsky-Shavell brief in *State Farm*, which repeatedly asserted that the Utah Supreme Court's decision in that case was fundamentally "irrational,"[4] Professors Polinsky and Shavell have found nothing to criticize about the decision below, nothing at all. Instead of criticizing that decision as irrational and the award upheld by the court below as excessive and as an example of overdeterrence, the only thing Professors Polinsky and Shavell find fault with in this case are the arguments advanced by *plaintiff's counsel* – which they concede were "eschewed" by the court below[5] – regarding

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[2] Brief Amicus Curiae of A. Mitchell Polinsky, Steven Shavell, and the Cato Institute in Support of the Petitioner, in *Philip Morris v. Williams*, No. 05-1256.

[3] Brief Amicus Curiae of A. Mitchell Polinsky, Steven Shavell, and the Citizens for a Sound Economy Foundation in Support of Petitioner, in *State Farm v. Campbell*, No. 01-1289.

[4] *Id.* at 3, 5, and 14.

[5] Brief Amicus Curiae of A. Mitchell Polinsky, Steven Shavell, and the Cato Institute in Support of the Petitioner, in *Philip Morris v. Williams*, No. 05-1256, at 3.

the use of "Philip Morris's wealth as a basis for upholding the punitive damages."[6] Thus Professors Polinsky and Shavell state that

> Although the Oregon Supreme Court eschewed reliance on Philip Morris' wealth as a basis for upholding the punitive damages, the plaintiff consistently relied on it in arguing that the punitive award was not excessive. Because she can be expected to do so again in this Court and because the issue of the proper role of corporate financial condition [sic] is an important and recurring one, amici believe that addressing that issue may be of assistance to the Court.[7]

Amici agree with Professors Polinsky and Shavell that the question of what role a defendant's wealth should play in calculating punitive damages awards is both an important and a recurrent problem. Amici further agree that it would be inappropriate for a court to rely solely on a tortfeasor's wealth in determining the appropriate size of a punitive damages award. Nevertheless, inasmuch as the Oregon Supreme Court did not rely on Philip Morris's wealth, to any degree, in undertaking its *de novo* review of the jury's award of punitive damages in this case, Professors Polinsky and Shavell have not identified and we have not found any reason in law and economics theory and practice to overturn the decision below.

ARGUMENT

Like the Utah Supreme Court in *State Farm*, the Oregon Supreme Court relied on deterrence-based arguments in upholding a large punitive damages award in this case. Because many of the deterrence theory issues here

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[6] *Id.*

[7] *Id.*

are the same as those addressed in the *State Farm* litigation,[8] *amici* will review the areas of deterrence theory that are non-controversial and briefly touch on one topic of controversy that has been raised by the Polinsky-Shavell brief filed in this case.

Punitive damage awards have been justified for many years on the grounds that they *deter* and *punish* the perpetrators of harmful conduct. Punishment, with its roots in vengeance, is the oldest rationale for the law,[9] serving as a ready justification for the cruelest punishments of ancient legal systems. The theory of deterrence is a comparatively modern development that has served primarily as a set of rigorous arguments for putting limits on penalties. For this reason, *amici* will focus on the theory of deterrence, because the punishment goal generally supports penalties at least as severe as those suggested by deterrence theory.

As *amici* hope to make clear in this brief, the economic theory of deterrence supports the approach taken by the Oregon Supreme Court in this case. Indeed, even the views expressed by Professors Polinsky and Shavell,[10] Petitioner's deterrence theory experts, provide ample support for the Oregon appellate court's decision. The silence of Professors Polinsky and Shavell on two of the major issues presented in the Petition for Certiorari – whether punitive awards can aim to strip a tortfeasor's illicit

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[8] *Compare* Brief of Keith N. Hylton as Amicus Curiae in Support of Respondents, in *State Farm v. Campbell*, No. 01-1289, *with* Brief Amicus Curiae of A. Mitchell Polinsky, Steven Shavell, and the Citizens for a Sound Economy Foundation in Support of Petitioner, in *State Farm v. Campbell*, No. 1289. *Amici*'s views on punitive awards have been set out in Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L. J. 421 (1998); Keith N. Hylton and Thomas J. Miceli, *Should Tort Damages Be Multiplied?* 21 J. LAW, ECON. & ORG. 388 (2005).

[9] Oliver Wendell Holmes, Jr., THE COMMON LAW (1881), at 2-15.

[10] *See* A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

gains and whether harms to individuals other than the plaintiff can be taken into account in determining the appropriate level of punitive damages – is deafening, for they have argued in support of both approaches in their academic writing on punitive damages.[11]

I. DETERRENCE THEORY SUPPORTS THE IMPOSITION OF PUNITIVE DAMAGES IN CERTAIN TORT CASES.

The theory of deterrence has been developed over 200 years, starting with the publication of Italian social philosopher Cesare Beccaria's ON CRIMES AND PUNISHMENTS in 1764. Writing at a time when torture and capital punishment were common responses to crimes of all types, from murder and rape to begging without a license or stealing letters,[12] Beccaria argued that penalties should be set at a level that removes the prospect of profit or gain from the

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[11] *Id.* at 887-900 (arguing, quite forcefully, for multiplying damages to take into account losses imposed on individuals other than the plaintiff); and at 907-07 & n.120, 918 n.154 (supporting gain elimination goal).

[12] *See* E. P. Thompson, WHIGS AND HUNTERS : THE ORIGIN OF THE BLACK ACT (1975) The Black Act (9 Geo. 1 c. 22), was enacted by the British Parliament in 1723 during the reign of King George I in response to the Waltham deer poachers and a group of bandits known as the "Wokingham Blacks." It made it a felony, i.e., a hanging offence, to appear armed in a park or warren, or to hunt or steal deer, with the face blackened or disguised. The Act was later amended to deal with protestors outside the royal forests and chases, becoming a brutal adjunct to the Riot Act of 1715. Both statutes were part of the "Bloody Code," a system of laws and punishments in England from the 1700s to the mid-1800s. Although it was not called the Bloody Code in its own time, the name was given later because many felonies, including stealing anything worth 5 shillings (25p) or more, stealing letters, poaching, impersonating a Chelsea Pensioner, cutting down young trees, begging without a license if you were a soldier or sailor, being in the company of gypsies for a month, "strong evidence of malice" in children 7-14 years old, and at least 200 additional offenses were punishable by execution. The punishments were unusually harsh at this time because the laws were made by wealthy landowners who wanted to protect their property. It was thought that the best method for deterring crime was to make people too afraid of the punishments to commit crimes.

offender, and not much above that level.[13] Beccaria feared that if penalties were made unreasonably harsh, they would encourage harsh conduct on the part of offenders, perhaps by setting an example that implicitly approves the very cruelty the law aimed to suppress.

Since Beccaria, deterrence theory has largely involved refinements and qualifications of this basic economic approach. Jeremy Bentham, the eighteenth century English philosopher, introduced the notion of marginal deterrence as a reason for keeping penalties close the gain-eliminating level.[14] The theory of marginal deterrence favors modesty in setting penalties in order to avoid giving an incentive to the offender to choose the most harmful of a set of possible actions. For example, if the state imposes the death penalty for purse-snatching, purse-snatchers would have an incentive to murder their victims because it would lower the likelihood of being caught and have no effect on the final penalty. On the other hand, a more moderate penalty for purse-snatching could deter purse-snatching and at least make it within the purse-snatcher's interests to do no more than steal his victim's purse.

The next major refinement of the theory of deterrence was a 1968 law review article by University of Chicago economist (and Nobel laureate) Gary S. Becker[15] Becker

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[13] Cesare Beccaria, ON CRIMES AND PUNISHMENTS 43-44 (Henry Paolucci, ed., Bobbs-Merrill 1963). Indeed, England's "Bloody Code" died out in the mid-ninetieth century because judges and juries thought that punishments were too harsh for many of the criminals, so they became less inclined to find them guilty in court. Because the lawmakers still wanted punishments to deter potential criminals, but needed them to become less harsh, transportation across the seas (typically to Australia became the more common punishment.

[14] Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OR MORALS AND LEGISLATION 181-84 (Prometheus Books 1998)(1781).

[15] *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

argued in favor of replacing Beccaria's and Bentham's gain-eliminating penalties with "cost-internalizing" penalties for activities that cause harm, but, on balance, are socially useful or economically beneficial. Cost-internalizing penalties, as the term suggests, shift or internalize to the offender the losses his conduct imposes on society. If the offender gains $100 from committing an offensive act that imposes a $10 loss on his victim, the cost internalization approach would require a penalty of $10, while the gain elimination approach would require a minimum penalty of $100.

Cost-internalizing penalties are especially appropriate, in Becker's view, with respect to activities for which the offender's gain exceeds the likely loss of the victim, which is true of many economically beneficial activities that cause harms. Under Becker's scheme, an activity for which the gain exceeds the likely loss would have an incentive to continue under the cost internalization approach. Becker's approach is particularly useful in areas such as torts or antitrust, in which courts award damages to victims injured by activities that are socially desirable overall. But Becker also argued that if the offender's likely gain is less than or equal to the victim's likely loss, which is true of simple crimes such as theft, the optimal approach is to strip the offender of any and all gains. Nevertheless, because the cost internalizing penalty would have this effect anyway, Becker found this to provide additional support for cost internalization as a general approach.

Another important innovation in the economic theory of deterrence can be traced to an article by Yale Law Professor (now Judge) Guido Calabresi and A. Douglas Melamed on "property rules and liability rules"[16] and an article by University of Chicago Law (now Judge) Professor

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[16] Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

Richard A. Posner on the economics of criminal law.[17] The fundamental insight from these articles and decisions is that when market transactions are easily carried out, gain eliminating penalties are preferable in order to encourage use of the market.[18]

Summing up, the economic theory of deterrence distinguishes two approaches: gain elimination and cost internalization. Gain elimination is appropriate when market transactions are easily arranged, or when the conduct is virtually always socially undesirable such as theft. Cost internalization, on the other hand, is preferable when market transactions are difficult to arrange and the activity of the offender is generally socially beneficial.

Gain elimination is equivalent to a policy of complete deterrence, of aiming to reduce the frequency of the wrongdoer's injurious activities to zero. Without attempting to calculate costs and benefits, it is immediately intuitive that there are some acts that should be completely discouraged, such as fraud, theft, rape, and murder. There is no optimal degree of fraud or murder that society should wish to encourage.

Cost internalization is equivalent to a policy of resource management. The offender's conduct may have been harmful to a particular victim, but society should not set out to completely shut down the offender or wholly ban its activities. For example, a railroad may cause enormous damage to nearby farmers by spitting sparks onto their fields and thereby igniting their crops. But society benefits greatly from railroads and has no interest in setting penalties

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[17] Richard A. Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

[18] Judge Calabresi recently expanded upon this and related themes in *Ciraolo v. City of New York*, 216 F.3d 236, 242-48 (2d Cir.), *cert. denied*, 531 U.S. 993 (2000), as did Judge Posner in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676-78 (7th Cir. 2003)

that entirely eliminate the profits from rail service. Cost internalizing penalties, on the other hand, will provide railroads with incentives to find the optimal level of activity – the level at which the gains to society are at a maximum.

The economic theory of deterrence has clear implications for three issues at the core of this case: whether damages should be limited in a case in which the defendant's conduct is reprehensible, whether the harm to people other than the plaintiff should be taken into account in setting a punitive award, and the role of the defendant's profits or wealth in determining a punitive award.

II. THERE IS NO DISAGREEMENT THAT PUNITIVE DAMAGES ARE ECONOMICALLY RATIONAL IN CASES IN WHICH THE DEFENDANT'S CONDUCT IS REPREHENSIBLE.

Reprehensible conduct is social or economic behavior that society has no rational interest in encouraging or allowing to persist to any degree. Although there may be limits in the amount of public resources society may be willing to invest in the apprehension of purse-snatchers or the detection of fraud, there is no optimal amount of purse-snatching, and no optimal amount of fraud. The optimal scale of such reprehensible conduct is zero. As to this proposition, there is no disagreement in the economic literature on deterrence.

This implies that the proper goal of a punishment authority in the context of reprehensible conduct is complete deterrence. This, in turn, implies that penalties should be set, at a minimum, to eliminate any prospect of gain on the part of the offender. Thus, if the offender's gain is $100, the penalty must be no less than $100.

Moreover, this implies that if the conduct is truly reprehensible, there is no deterrence-based argument for putting a ceiling on the criminal penalty or the punitive damages award. The reason for this is that society has no

interest in permitting reprehensible conduct to persist. Thus, if the offender is responsible for a reprehensible act from which he gains $100, there is no deterrence-based argument against imposing a penalty greater than $100.

Professors Polinsky and Shavell, who cite their law review article on punitive damages in their brief, have argued in favor of this position, which reflects the consensus view. Their article recognizes that where "a reprehensible act is purely intentional, overdeterrence cannot occur,"[19] and that the optimal social objective is one of "deterring such acts completely."[20] Moreover, that objective, they note, requires *"a measure of damages equal to the greater of gain or harm."*[21]

This is not to say that there are no arguments at all for limiting the penalty in the case of reprehensible conduct. One might argue that it makes no sense to fine the offender $200 if it is clear that he cannot pay it. This is an acceptable economic argument, but it has nothing to do with the theory of deterrence, which focuses exclusively on the public desirability and social utility of deterring the offender's conduct. If there is no socially beneficial aspect to the offender's harmful conduct, there is no deterrence-based reason for limiting the penalty applied to it.

III. THERE IS NO DISAGREEMENT THAT IT IS ECONOMICALLY RATIONAL TO TAKE INTO ACCOUNT THE HARMS TO A TORTFEASOR'S OTHER VICTIMS.

Suppose the offender's conduct is reprehensible and he gains $100 from it. Suppose also, that the offender gets caught by the punishment authority only half of the time he

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[19] Polinsky and Shavell, 111 HARV. L. REV. at 907 & n.120.

[20] *Id.* at 906.

[21] *Id.* at 918 n.154 (emphasis added).

engages in offensive conduct. What is the right penalty on deterrence grounds?

Because the defendant's conduct is reprehensible, he should be stripped of the prospect of gaining from it. Because he is caught only half of the time, the penalty applied in those cases must strip the offender of the gains he enjoyed from the times he was not caught. This suggests that the penalty should be no less than $200 in order to satisfy the gain-stripping goal that is uniformly understood to be appropriate under the theory of deterrence.

Increasing the penalty to ensure that the infrequently-caught offender is stripped of illicit gains – a policy that has uniformly accepted in the economic deterrence literature since Bentham – is equivalent (in economic deterrence terms) to taking into account the harms done to others by an offender when punishing that offender. In other words, imposing a penalty of a minimum of $200, because the offender gets caught only half of the time, is equivalent to imposing a penalty that compensates the plaintiff-victim and another victim who is not present before the court.

Although Petitioner Philip Morris argues that this is controversial and constitutionally suspect, it is a fundamental implication of the theory of deterrence. If punitive damages are to be effective as a deterrent, they must be allowed to serve this multiplicative function. Significantly, Professors Polinsky and Shavell do not contest this point in their brief and there is no disagreement in the law and economics literature on this proposition.

Indeed, Professors Polinsky and Shavell recognize and support the use of multipliers in calculating punitive damage awards. Thus, the core proposition of their law review article on punitive damages is that "*if a defendant can sometimes escape liability for the harm for which he is responsible, the proper magnitude of damages is the harm the defendant has*

caused, multiplied by a factor reflecting the probability of his escaping liability."[22] As their first illustration of how a defendant might escape liability, Professors Polinsky and Shavell note that

> the victim may have difficulty determining that the harm was the result of some party's act – as opposed to simply being the result of nature, of bad luck. For instance, an individual may develop a form of cancer that could have been caused by exposure to a naturally occurring carcinogen, such as radon gas, but which was in fact caused by exposure to a manmade carcinogen released by the injurer.[23]

Rather strikingly, Professors Polinsky and Shavell offer a hypothetical that appears to describe this case as their first illustration of an instance in which it is appropriate to multiply damages in order to provide the economically optimal level of deterrence. And Professors Polinsky and Shavell, after proposing the foregoing hypothetical anticipating this case, conclude that damages should be multiplied because *"if damages merely equal harm, injurers' incentives to take precautions will be inadequate and their incentive to participate in risky activities will be excessive."*[24] Yet Petitioner now stands before this Court to argue that it is never appropriate to multiply damages, and that the damage award should be limited to the harm suffered by the individual plaintiff.

IV. ALTHOUGH THERE IS SOME CONTROVERSY ABOUT WHETHER IT IS APPROPRIATE TO USE A

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[22] Polinsky and Shavell, 111 HARV. L. REV. at 887 (emphasis in original).

[23] *Id.* at 888.

[24] *Id.* (emphasis in original).

DEFENDANT'S OVERALL WEALTH IN ASSESSING PUNITIVE DAMAGES, THERE IS NO DEBATE THAT IT IS ECONOMICALLY RATIONAL TO USE PUNITIVE DAMAGES TO STRIP AWAY A TORTFEASOR'S ILLICIT PROFITS OR GAINS.

Perhaps in view of these broad areas of consensus, Professors Polinsky and Shavell focus in their amicus brief on a question that, as noted above, is *not* at issue before this Court: the role of wealth in determining the size of a punitive award. Thus, as noted above, Professors Polinsky and Shavell acknowledge that "the Oregon Supreme Court eschewed reliance on Philip Morris' wealth as a basis for upholding the punitive damages."[25]

Furthermore, Professors Polinsky's and Shavell's discussion of wealth is not only irrelevant to this case but generally incomplete and therefore not terribly helpful. Professors Polinsky and Shavell distinguish between conduct that has a nonmonetary motivation and conduct that has a monetary motivation. For conduct motivated by nonmonetary considerations, Polinsky and Shavell argue that the defendant's wealth may be an appropriate factor to take into account in determining the penalty. They offer as an example the case of an individual who, for spiteful pleasure, destroys his neighbor's flower garden.[26] They note that the wrongdoer should "face a threat of damages that is sufficiently high to offset the spiteful enjoyment he would experience from destroying the flower garden. That level of damages will ordinarily be higher for a wealthy individual than for a poor one, for dollars usually have less significance to the wealthy than to the nonwealthy."[27]

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[25] Brief Amicus Curiae of A. Mitchell Polinsky, Steven Shavell, and the Cato Institute, at 3.

[26] *Id.* at 7.

[27] *Id.*

For conduct motivated by monetary considerations, Professors Polinsky and Shavell argue that the defendant's wealth is not an appropriate factor to take into account in the determination of the penalty. They say that "when a party's motivation is monetary, the party will be induced by the threat of damages to compare the monetary gain he would obtain from his act against the dollar damages in the same way regardless of his level of wealth."[28]

Although the distinction Professors Polinsky and Shavell draw between monetary and nonmonetary motives and their conclusion with respect to nonmonetary motives is quite reasonable, their analysis of the case of monetary motives appears to be incomplete. The analysis of monetary motives should distinguish between the case in which the offender's conduct is reprehensible and the case in which it is not.

If the offender's conduct is reprehensible, society has no interest in allowing it to occur at any scale. It follows, then, from the theory of deterrence that the penalty should be at least as large as the minimum of the illicit gain expected by the offender. Consider a variation of the example used by Professors Polinsky and Shavell: suppose the offender steals valuable flowers from his neighbor's garden in order to enjoy them from a closer vantage point. The gain to the offender is the value of the flowers to him: the maximum amount that he would have been willing to pay for the flowers. The offender's maximum willingness-to-pay for the flowers, however, is unquestionably influenced by his wealth. The wealthy offender will be willing to pay more for the flowers than will the nonwealthy offender. Given this, it is entirely appropriate to take the offender's wealth into account in determining the optimal penalty for this case of reprehensible conduct. A penalty that is set too low would fail to eliminate the illicit gain of

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[28] *Id.*

the offender, and therefore fail to act as a deterrent to theft. If the offender's gain, which is equal to the maximum that he would be willing to pay for the flowers, exceeds the victim's loss, setting a penalty equal to the victim's damages would be too low to serve as an effective deterrent.

To take another variation, suppose the offender steals his neighbor's flowers with the intent to sell them for a substantial profit. In this case, the offender's motivation is clearly monetary. Suppose the flowers are worth $100 to the victim, but the offender has found an unusually wealthy buyer who will pay $1000 for the flowers. The appropriate penalty, in order to completely deter the conduct, is a sum no less than the offender's profit, which is $1000. Thus, in the case in which the offender's reprehensible conduct is motivated by a desire for monetary profit, the penalty should be large enough, at a minimum, to wipe out the profit gained by the conduct.

If the offender's conduct is not reprehensible, then the analysis of Professors Polinsky and Shavell is appropriate. They offer the following example:

> Suppose that an individual could save $100 by not purchasing a safety device. Clearly, the individual would be induced to spend $100 on the device if he would have to pay more than that amount in damages, such as $200, for failure to do so. And importantly, the individual would buy the device under these circumstances whether he is poor or rich: regardless of his wealth, he would prefer to spend $100 on the device than to pay $200 in damages.[29]

Even in this example, whether the goal of damages should be gain-stripping or cost-internalization depends on

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[29] *Id.* at 8 (footnote omitted).

the nature of the individual's act. In many cases, failure to purchase a safety device may not be reprehensible. For example, the failure of an automobile driver to buy and install a rear-facing television camera that would permit him to observe objects behind his car would not be considered a reprehensible act. If damages are appropriate at all for such a failure, they should only serve the purpose of cost internalization. In some cases, however, failure to invest in safety may be considered reprehensible. Suppose a car rental firm knows that the steering mechanism on many of its cars is defective, and yet continues to rent the cars because it knows from experience that car renters involved in accidents are unlikely to determine that the defective steering mechanism caused the accident. In this case, the goal of the damage award should be to completely deter the firm's conduct, which requires setting the damage award at the greater of the firm's gain or victim's loss.

Summing up, the economic theory of deterrence does not support the argument that wealth should never be a relevant consideration in the calculus of a punitive damages award when the defendant's motives are monetary in nature. The important distinction is not whether the defendant's motivation is monetary; rather, it is whether the defendant's conduct is reprehensible. If the offender's conduct is reprehensible, deterrence theory suggests that the appropriate penalty should seek to deter the conduct completely, which usually requires a penalty that is sufficiently large to eliminate the prospect of gain to the offender. In some cases, such a penalty will depend, at least in part, on the wealth of the offender or the profitability of his misconduct.[30]

V. THE ONLY TROUBLING ISSUES RAISED BY THIS CASE AND BY *STATE FARM* ARE QUESTIONS OF

[30] As discussed above, the size of the optimal punitive damages award may also depend on the likelihood that the offender's conduct will be detected and that a civil suit will be successfully prosecuted.

APPLICATION AND DETAIL, NOT QUESTIONS OF BASIC ECONOMIC THEORY.

The basic economic theory of deterrence is largely settled, and the common law regarding punitive awards in many states is rather consistent with the theory.[31] Thus, following this Court's statement in *TXO Production Corp. v. Alliance Resources Corp.*[32] that "[i]t is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred," many states permit courts to take into account the actual and potential harm to nonparties in setting a punitive damages award.[33] Many states also permit courts to examine the wealth of the offender[34] and the profitability of his conduct in setting such awards.[35] These are all basic considerations in the rational design of punishment for deterrence purposes, and a decision by this Court prohibiting courts from taking such factors into account would effectively destroy the deterrent effect of punitive damages.

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[31] Hylton, 87 GEO. L. J. at 445-60.

[32] 509 U.S. 443, 460 (1993).

[33] *See, e.g., Gilbert v. Security Finance Corp. of Oklahoma, Inc.*, ___ P.3d ___, 2006 WL 1836019, *8 (Okla. 2006); *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 452 (Kan. 2006); *Sweet v. Roy*, 801 A.2d 694, 715 (Vt. 2002).

[34] *See, e.g., Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63, 78 (Cal. 2005); *Frazier v. Badger*, 603 S.E.2d 587, 593 (S.C. 2004); *Vendelin v. Costco Wholesale Corp.*, 95 P.3d 34, 51 (Idaho 2004); *Darcars Motors of Silver Springs, Inc. v. Borzym*, 841 A.2d 828, 843 (Md. 2004).

[35] *See, e.g., Liberty Mut. Ins. Co. v. Land*, 892 A.2d 1240, 1253 (N.J. 2006); *Gilbert v. Sec. Fin. Corp.*, 2006 WL 1836019 at *7; *Johnson v. Ford Motor Co.*, 113 P.3d 82, 93 (Cal. 2005); *Marie Deonier & Associates v. Paul Revere Life Ins. Co.*, 101 P.3d 742, 749 (Mont. 2004).

Whatever troubling issues may be raised by this case and by *State Farm* are questions of application and detail, not questions of basic economic theory. In this case, the punitive award was apparently designed to substantially reduce much of the gains Philip Morris had enjoyed from intentionally defrauding many Oregon consumers over many years, deliberate misconduct that had the additional consequence of killing many of the defrauded consumers.[36]

In terms of the economic theory of deterrence, the Oregon court's approach toward the punitive damages award appears to be entirely appropriate. Fraud is a classic example of reprehensible conduct. Given this, the appropriate response is to set a penalty that not only deters the misconduct but deters it completely An award that wipes out the gain to the offender from defrauding a particular consumer is the least that can be done.

Moreover, when the offender is caught, prosecuted, and punished infrequently, deterrence theory counsels that the award should seek to wipe out the illicit gains enjoyed by defrauding many consumers. This is apparently the approach that the Oregon courts have taken in this case. As a matter of theory, there is nothing controversial or questionable about this approach.

As noted above, whatever troubling issues are raised by a case of this type are matters of application and factual detail. Perhaps the named plaintiff or the other alleged fraud victims never received or did not really rely on the mass-marketed fraudulent statements. Perhaps the alleged tortfeasor never sold products in a particular state. Perhaps the allegedly fraudulent statements were not misleading at all. At bottom, although these kinds of issues may lie at the core of a particular lawsuit, they have little to do with the

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[36] The $79.5 punitive damage award represented approximately two-and-a-half weeks of Philip Morris's annual profits in the year in which the verdict was rendered.

fundamental design and function of punitive damages. However, details matter greatly in the real world implementation of any theory.

Consider the issue of penalizing a tortfeasor for the harms suffered by other victims of its fraudulent conduct. How can punitive damages serve a deterrent purpose, and at the same time prevent defendants from being forced to pay a penalty for victims who may not exist?

On one hand, one could argue, consistent with deterrence theory, that this is not an issue that should trouble a court. If the defendant has been found guilty of reprehensible conduct, it should suffer a penalty that completely deters such conduct. The penalty should be, at a minimum, sufficient to eliminate the gain from that misconduct. If it happens to be larger than that minimum, that is not "a problem" from the perspective of deterrence theory. The reason is that if the conduct is reprehensible, there is no risk of "overdeterring" the conduct. In other words, there is no cost to society from over-deterring fraud or theft.

On the other hand, in view of the possibility of courtroom errors, there is a risk that punishing conduct that has been deemed fraudulent might overdeter legitimate or even desirable conduct. Overdeterrence, in the context of products, is observed in instances in which products that consumers desire are withdrawn from the market or sold at excessive prices. Although this hypothetical risk is noted in the Polinsky-Shavell brief, given that cigarettes have no social benefit whatsoever one might certainly question whether society loses anything at all if damage awards force cigarette sellers to raise their prices, (Many empirical studies indicate that cigarette price increases reduce cigarette consumption, to the benefit of the public's health).[37] Finally,

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[37] *See* Congressional Budget Office, *The Proposed Tobacco Settlement: Issues From A Federal Perspective*, at 3 (April 1998)

although the possibility that a series of excessive damage awards might overdeter legitimate and socially useful conduct might be a valid concern in some cases, the applicability of this point is highly attenuated in the special case of cigarettes.

The best answer to the hypothetical problem of overdeterrence is not to eliminate punitive awards altogether or to disallow consideration and disgorgement, of a defendant's illicit profits – which would be the practical effect of refusing to permit courts to penalize the defendant for harms done to victims other than a named plaintiff – but to allow the jury to be informed about earlier awards or to authorize the court to provide offsets for successive punitive damage awards.[38]

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http://www.cbo.gov/ftpdocs/4xx/doc407/tobacco.pdf ("Considerable research supports the proposition that increasing the price of cigarettes would be the most effective way to reduce their use.").

[38] Another possible solution might be to permit the defendant to offer statistical evidence that the award is excessive, perhaps because of the rare or unique nature of the victim's harm. In a case in which the defendant has been found guilty of engaging in reprehensible conduct, it should not be the plaintiff's or the court's responsibility to prove that the award is not excessive. It is the defendant who has been found guilty of reprehensible conduct, and it should be solely his burden, after such a finding, to present evidence sufficient to persuade a court that a punitive award is excessive. This is an appropriate balance that preserves the deterrent function of punitive damages, and at the same time permits defendants to persuade courts that certain awards should be reduced or eliminated because of excessiveness.

If the responsibility is placed on the plaintiff or on the court to prove that a particular award is not excessive in a case in involving reprehensible conduct, then it will become unlikely that punitive awards will be able in practice to serve the deterrent function suggested by theory. Individuals who engage in reprehensible conduct will know that even though they face the theoretical risk of a punitive award, in practice it is unlikely that any plaintiff or court will be able cost-effectively to produce evidence that proves that the award should withstand scrutiny on appeal. And indeed, the individual engaged in reprehensible conduct would have every incentive to take steps to obscure the record and

CONCLUSION

Inasmuch as the Oregon Supreme Court did not rely on Petitioner Philip Morris's wealth in undertaking its *de novo* review of the jury's award of punitive damages against that company, and insofar as Professors Polinsky and Shavell have not identified and we have not found any reason in law and economics theory to believe that the Oregon Supreme Court incorrectly applied law and economics principles – especially deterrence theory – in upholding of the punitive damage award in this case, *amici* respectfully submit that there is no reason why that court's judgment should not be affirmed.

Respectfully submitted,

RONALD SIMON*
SIMON & ASSOCIATES
1707 N Street, N.W.
Washington, DC 20036
(202) 429-0094

CHRISTINE SPAGNOLI
GREENE BROILLET & WHEELER, LLP
100 Wilshire Blvd., 21st Fl.
P.O. Box 2131
Santa Monica, CA 90407
(310) 576-1200

September 15, 2006

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prevent potential plaintiffs from producing sufficient evidence to uphold a punitive award. In the case of reprehensible conduct this would produce a set of perverse incentives in which bad actors can reasonably expect to prevail, in the sense that the penalties assessed by the courts will almost always be insufficient to wipe out their illicit profits. But the situation should be the reverse: those who engage in reprehensible conduct should expect to lose. Moreover, those who engage in reprehensible conduct should be aware that it will be their burden to prove that a punitive award, that seems appropriate to the court on the basis of the evidence introduced in the case, is excessive, rather than the plaintiff's burden to produce additional evidence to support the award.

ED BELL
BELL LAW FIRM
232 King Street
Georgetown, SC 29442
(843) 546-2408

ROGER S. BRAUGH, JR.
SICO, WHITE & BRAUGH, LLP
900 Frost Bank Plaza
802 N. Carancahua St.
Corpus Christi, TX 78470
(361) 653-3300

PATRICK CARR
CARR & CARR
4416 S. Harvard Ave.
Tulsa, OK 74135
(918) 747-1000

RICHARD L. DENNEY
DENNEY & BARRETT, P.C.
870 Copperfield Drive
Norman, OK 73072
(405) 364-8600

JOHN ECHEVERRIA
ECHEVERRIA LAW FIRM
9432 Double R Blvd.
Reno, NV 89521
(775) 786-4800

W. HAMPTON KEEN
LYTAL REITER CLARK
FOUNTAIN & WILLIAMS
10th Floor, Northridge Centre
515 N. Flagler Dr.
West Palm Beach, FL 33401
(561) 655-1990

PETER M. KELLY
MOORE & KELLY, PC
1005 Heights Boulevard
Houston Texas 77008
(713) 529-0048

DANIEL RODRIGUEZ
RODRIGUEZ & ASSOCIATES, PLC
2020 Eye Street
Bakersfield, CA 93310
(661) 323-1400

G. LYNN SHUMWAY
6909 E. Greenway Parkway
Suite 200
Scottsdale, AZ 85254
(480) 368-0002

CHARLES SIEGEL
WATERS & KRAUS, LLP
3219 McKinney Avenue
Dallas, Texas 75204
(214) 357-6244

GERRY L. SPENCE
ROBERT A. KRAUSE
THE SPENCE LAW FIRM, LLC
15 South Jackson Street
P.O. Box 528
Jackson, WY 83001
(307) 733-7290

4806

(14)

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In the Supreme Court of the United States

PHILIP MORRIS USA, PETITIONER
v.
MAYOLA WILLIAMS, RESPONDENT

On Writ Of Certiorari
To The Supreme Court Of Oregon

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, THE AMERICAN CHEMISTRY COUNCIL, AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JAN S. AMUNDSON
QUENTIN RIEGEL
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-3000

GENE C. SCHAERR
Counsel of Record
STEFFEN N. JOHNSON
JEFFREY M. ANDERSON
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

CONAN P. GRAMES
DIANE BIERI
Pharmaceutical Research & Manufacturers of America
950 F Street, N.W., Suite 300
Washington, D.C. 20004
(202) 835-3400

LINDA T. COBERLY
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

Counsel for Amici Curiae
[Additional counsel on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

DONALD D. EVANS
American Chemistry Council
1300 Wilson Blvd.
Arlington, Virginia 22209
(703) 741-5000

MARIA GHAZAL
Business Roundtable
1717 Rhode Island Ave., N.W.,
Suite 800
Washington, D.C. 20036
(202) 496-3268

QUESTIONS PRESENTED

Although this Court granted review of two questions, *amici curiae* will address only the following question: Whether due process permits a jury to punish a defendant based on alleged harm to non-parties, where the named plaintiff has not satisfied the requirements for proceeding in a class action format or otherwise established that she and the non-parties have such common interests that any judgment as to her should have preclusive effect in future actions involving the non-parties.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

This case illustrates a practice, all too common in modern civil litigation, in which plaintiffs' lawyers urge juries to use punitive damage awards to "send a message" to corporate defendants—not only for the conduct at issue in the case at hand, but for alleged harms to third parties whose claims were not tried to the jury. These appeals, moreover, are made without satisfying the requirements for class action suits, adopted in virtually every jurisdiction, or establishing by other means that the non-parties have such a common interest with the named plaintiff that a judgment on the named plaintiff's claim should have preclusive effect in future cases brought by the non-parties. In addition, juries are often told that federal and state regulatory agencies have failed to provide adequate protection against corporate wrongdoing, and that the jurors must do the job that the government failed to do. As a result, punitive-damages claims all too often devolve into a kind of quasi-class-action litigation, undertaken with the purpose and effect of displacing (or at least second-guessing) the regulatory regimes established by elected public officials.

Amici Curiae are associations of corporations, and their most senior officers, representing some of the largest sectors of the nation's economy. They believe that allowing punitive damages for harm to non-parties is not only bad for American businesses, their employees, and the customers they serve, but also inconsistent with historical practice under the common law and contemporary practice under the class action procedures of every State. Such awards deprive defendants of their property without notice and an opportunity to be heard, in violation of core principles of procedural due process.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or

A more complete statement of interest of each *amicus* is set forth in Appendix A to this brief.

STATEMENT

Like most cases in which punitive damages are sought, this case arises from a tragic event—the death of Jesse Williams, who smoked cigarettes for about 47 years. Pet. App. 2a. Respondent, Williams' widow, sued petitioner for negligence and fraud, alleging that Williams' death resulted from his reliance on petitioner's campaign to undercut public information about the risks of smoking. The jury found that Williams was 50 percent responsible for his own injury. Nevertheless, it found petitioner liable for negligence and fraud and awarded respondent $21,485.80 in economic damages and $800,000 in non-economic damages.

Respondent also sought punitive damages based in large part on respondent's suggestion in closing argument that petitioner's alleged misconduct must have harmed thousands of other smokers—three or four percent of all smokers in Oregon. Respondent, however, adduced no evidence that could support a finding that anyone other than Williams actually relied on petitioner's alleged misrepresentations or that those misrepresentations actually caused injuries to any other person. Accordingly, to ensure that the jury could not award damages based on unproven injuries to non-parties, petitioner requested an instruction directing the jury that it was '"not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit." Pet. App. 17a-18a. The court refused to give this instruction, and the jury returned a $79.5 million punitive award. The Oregon Supreme Court ultimately affirmed the award in its entirety,

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submission of the brief. Pursuant to Rule 37.3(a), petitioner and respondent have filed with the Court a blanket consent for all *amici*.

holding that it was wholly proper for the jury to impose punitive damages for harms to non-parties. *Id.* at 20a-21a.

SUMMARY OF ARGUMENT

I. The Oregon Supreme Court's decision illustrates an all-too-frequent tendency of punitive-damages litigation to become, contrary to this Court's admonition, "a platform to expose, and punish, the perceived deficiencies" of a defendant's or industry's operations "throughout the country." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 420 (2003). That is because, in too many cases, trial courts allow plaintiffs to recover punitive damages from defendants based on unadjudicated allegations of harm to non-parties. Indeed, trial courts allow plaintiffs to recover such damages without satisfying the requirements of a class action or otherwise establishing that the non-parties have such a common interest with the plaintiff that a judgment in her case would be binding in later cases brought by the non-parties.

Such practices effectively circumvent the rule that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims." *Id.* at 423. In some cases they also violate the rule prohibiting States from regulating conduct outside their jurisdictions. *Id.* at 421. And they often have significant ripple effects because a single large punitive damages award typically serves as a bellwether for settlement—dramatically increasing the leverage of those who seek to impose quasi-regulatory demands on entire industries.

II. Both traditional and contemporary notions of due process prohibit imposing punitive damages for harms to non-parties whose claims the defendant has not had a meaningful opportunity to contest. To be sure, the law has long permitted plaintiffs whose claims are *representative* of others' claims to recover on behalf of the group. For as long as representative actions have existed, however, courts have required named plaintiffs to establish that the others whom

they seek to represent have such a common interest with the named plaintiff that the judgment on behalf of the class representative may fairly be given preclusive effect in future cases. As the Court stated in *Smith* v. *Swormstedt*, where "a few are permitted to sue * * * on behalf of the many, *care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.*" 57 U.S. (16 How.) 288, 303 (1853) (emphasis added).

Today, this basic sense of fairness is reflected in the class action rules of virtually every State. Those rules require plaintiffs to satisfy requirements such as commonality and typicality to ensure that defendants are not deprived of a hearing on issues that require individualized determinations. But even if a class action were not the exclusive means of recovering for harm to non-parties (which is the most reasonable inference to be drawn from the class action rules), the requirements for representation may not be dispensed with altogether. To allow a plaintiff to recover damages for alleged class-wide wrongs without establishing that her claims are truly representative of the class, or that the other requirements for representative actions are satisfied, deprives the defendant of any opportunity for an effective defense. Such a practice also threatens to subject defendants to multiple liability for the same wrongs, because non-parties who later bring their own claims are not barred from recovering by the rules of claim preclusion that would apply if the earlier suit had been certified as a class action.

ARGUMENT

The decision below illustrates why juries may not be allowed to impose punitive damages based on alleged harm to non-parties. Part I of this brief describes the various ways in which plaintiffs' lawyers, with the blessing of trial courts, use punitive damage claims to convert ordinary civil cases into quasi-class-action litigation, often in an attempt to impose sweeping regulation on entire industries. Part II explains how this practice deprives civil defendants of their opportunity to defend themselves against the non-parties'

claims and subjects them to the risk of multiple liability for the same conduct—in violation of due process.

I. The Presentation Of Punitive Damages Claims Often Violates This Court's Admonition Against Allowing Punitive Damages Litigation To Become "A Platform To Expose And Punish" A Company's Or Industry's "Perceived Deficiencies" In Its Dealings With Third Parties.

This Court has previously explained that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." *State Farm*, 538 U.S. at 423. But that is precisely what the Oregon courts allowed the jury to do in this case. The trial judge refused to instruct the jury that it was not allowed to punish petitioner for alleged harms to non-parties. And respondent's counsel took full advantage, seeking a punitive damages award based on the theory that three or four percent of all smokers in Oregon would get cancer from smoking Marlboros. See Pet. 2. Indeed, in closing argument respondent's counsel expressly appealed to the jury to punish petitioner for those alleged harms: "It's fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been. It's more than fair to think about how many more are out there in the future." *Ibid.*

As explained below, such tactics are all too common in modern punitive-damages litigation. Sometimes, as in this case, the plea is overt. Other times it is less direct. But in either case the result violates this Court's admonition that punitive-damages litigation must not become merely "a platform to expose, and punish, the perceived deficiencies of [the defendant's or the industry's] operations throughout the country." *State Farm*, 538 U.S. at 420.

A. Juries Are Often Asked To Base Punitive Awards On Harm To Third Parties.

One of the most common means by which plaintiffs' counsel attempt to obtain large punitive awards is by directly invoking alleged harms to parties not before the court. Indeed, in many cases plaintiffs' counsel neglect not only to prove any *damages* to these non-parties, but to prove that they are similarly situated to the plaintiff in any critical respect. Examples are collected in Appendix B to this brief.

GMAC v. *Baymon*, an insurance case, is illustrative. See App. 3a. There the plaintiff sued GMAC for fraud, claiming that she was overcharged by $762 for automobile insurance. Plaintiff's counsel exhorted the jury to do justice for the "600,000 other Menola Baymon[s] in Humphreys County, in Sunflower County, in Holmes County, in Memphis, Tennessee, and everywhere else in this country." *Ibid.* The jury awarded just $35,000 in compensatory damages, but tacked on a $5 million punitive damages award.

Similarly, in *Bullock* v. *Philip Morris USA, Inc.*, App. 4a, another smoking-and-health case, the plaintiff's counsel appealed to the jury to impose punitive damages based on the allegation that for every smoker who sues Philip Morris, 28,000 die from smoking. The jury obliged, awarding $28 billion in punitive damages—$1 million for each of the 28,000 people referenced in the plaintiff's closing argument.

Likewise, in *Diamond* v. *General American Life Insurance Co.*, App. 5a, a case involving an insurer's interpretation of a five-year limitation on disability benefits, the plaintiff was allowed to introduce evidence that the insurer had identified a total of 58 policyholders (including the plaintiff) with large potential claims and attempted to buy out their policies at discounts. Plaintiff's counsel repeatedly referred to the 57 other policyholders in seeking punitive damages, and the jury imposed a punitive award of $58 million—exactly 58 times the amount of the compensatory award. As the trial court recognized, the jury "almost to a certainty" arrived at

its punitive award by multiplying $1 million by the policyholders whose alleged harms were not proven at trial and adding $1 million for the plaintiff. App. 6a. Even so, the court let $18 million of the punitive award stand.

A similar appeal to the jury was made in *Brown* v. *Borg Warner*, a recent asbestos case. See App. 3a. There the plaintiff, a mechanic, brought suit seeking recovery for harm from exposure to asbestos in disc brakes. The plaintiff did not seek to establish the similarity of any non-party's claims to his own, let alone to certify a class. Nonetheless, his counsel's appeal for punitive damages was based on harm to non-parties who supposedly suffered similar injuries: "[if] the Borg Warner Corporation and the asbestos industry turned its back on safety and closed its eyes on the health of others, then it is your duty and responsibility to award a substantial amount of exemplary damages" not only for "William Brown individually, but [for] all the William Browns * * * out there doing their job." App. 4a.

The plaintiff's counsel then emphasized the same point in a manner calculated to result in the largest possible punitive award: "And let me assure you, ladies and gentlemen, that your voice will be heard. It will be heard in Chicago by the Borg Warner Corporation. It will be heard by an industry and it will be heard by all the William Browns of the world, and by all the corporations that would turn their back and close their eyes to the safety and welfare of the working people." *Ibid.*

City of Modesto v. *The Dow Chemical Company*, provides yet another illustration of this practice. See App. 11a. There, a city sued makers of perchloroethylene, a dry cleaning agent, and makers of dry cleaning equipment, alleging that perchloroethylene was defective and that the defendants were responsible for contaminating city water. During its appeal for punitive damages, the city repeatedly invited the jury to punish the defendants for contaminating wells nationwide. In so doing, the city invoked a single study

suggesting that 7 to 10 percent of wells nationwide contain *some* level of perchloroethylene:

> What would a responsible corporation do if they learned that their product was in 10 percent of the wells in the country? * * *
>
> If you know that your product has caused a problem of that magnitude, you can't blame it on a mom-and-pop dry cleaner. That couldn't do something all over the country. * * *
>
> [T]hey acted in conscious disregard of cities like Modesto and other communities throughout the country.
>
> After all, if we're talking about 10 percent of the wells in America, you're talking about the water supply for very large numbers, probably millions of people.

Ibid. The city, of course, had not even attempted to prove that the defendants were responsible for the presence of perchloroethylene in other communities' wells, let alone that such contamination was unlawful or harmed anyone. But that did not stop the jury from imposing $175 million in punitive damages on top of a $3.2 million compensatory award. As the jury's foreman told the press: "We wanted to send a message that this product should be taken off the market." See Dennis Pfaff, *Jury Orders $175 Million to Be Paid by Chemical Firms*, San Francisco Daily J. (June 14, 2006), at 2.

These are just some of the myriad cases in which jurors have been invited and allowed to base punitive awards on unadjudicated allegations of harm to non-parties. See Appendix B.

B. Such Requests Are Often Coupled With Explicit Or Implicit Pleas That Juries Must Assume A Leading Role In Regulating The Conduct Of Corporate Defendants And, In Many Cases, Entire Industries.

In arguing for punitive damages, plaintiffs' lawyers generally (though not always) adhere to the letter of this

Court's ruling in *State Farm* that States have no "legitimate concern" in allowing juries to "impos[e] punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." 538 U.S. at 421; see also *BMW of North Am.* v. *Gore*, 517 U.S. 559, 571 (1996). Nonetheless, plaintiffs' counsel frequently achieve the same result—and thereby also obtain damages for harms to third parties—by inviting jurors to serve as regulators of the entire industry of which the defendant is a part. This is yet another way in which punitive-damages litigation becomes a "platform" to punish a company's or an industry's "operations throughout the country." *State Farm*, 538 U.S. at 420.

1. As the *City of Modesto* case confirms, counsel seeking punitive damage awards often explicitly encourage juries to award punitive damages at such a level as to take a product "off the market." Indeed, as Judge Kozinski has observed:

> [J]urors across the country are regularly urged to impose punitive damages large enough to "send a message" to the defendant and others similarly situated. *** Interviews with jurors in case after case reveal that they have taken these admonitions to heart and have imposed punitive damages to "teach 'em a lesson" or "send a message." *** The message juries send is basically "Stop." Implicit in this is a judgment that the conduct in question is not merely tortious, meaning that those engaging in it should pay compensation when someone gets injured, but so wrongful that it should be abandoned altogether.

Alex Kozinski, *The Case of Punitive Damages v. Democracy*, Wall St. J. (Jan. 19, 1995), at A18.

Our research confirms Judge Kozinski's observations. For example, in a typical case involving a claim that the drug Pondimin (sometimes used in a combination called "fen-phen") was unreasonably dangerous, plaintiffs' counsel told the jury:

> You are more powerful right now than I'll ever be. You are more powerful than anyone in this room, in this city, in this state, or in this nation with regard to what you can say to a huge drug company and how you can get them to change. * * *
>
> [Y]ou are the voice of this community, this county, this state, this nation. * * * [Y]ou have the ability to make huge changes in the pharmaceutical industry and to make a huge change in this company. Send them a message. * * *
>
> Your verdict is going to be read by their CEO and by their board of directors, and by boards of directors of every pharmaceutical company in the world.

Batson v. *Wyeth*, App. 9a-10a. The jury obliged, awarding $25.35 million in punitive damages on top of a $3.9 million award of compensatory damages.

2. Other times juries are expressly invited to use punitive damages as a vehicle for establishing standards of conduct applicable to entire industries. For example, the plaintiff's counsel in *Brown* (discussed above) told the jury: "when you award exemplary damages, you establish standards of conduct, standards of decency, standards of corporate accountability, standards of corporate responsibility" for the disc brake industry. App. 4a.

Similarly, some plaintiffs' lawyers openly appeal to jurors to "send a message" to "others in the industry," to "warn [them] as to what the standards should be" (*Sunburst Sch. Dist. No* 2. v. *Texaco*, App. 14a), or to "change the way this insurance is done" (*GMAC* v. *Baymon*, App. 3a). See also *Flores* v. *Borg-Warner Corp.*, App. 15a ("send a message that the people of Corpus Christi, Texas are not gonna put up with this kind of behavior from Borg-Warner or from any other corporation"). Indeed, some such appeals to juries border on attempts to invite jurors to punish legal behavior. As the plaintiffs' counsel told the jury in a smoking-and-health case resulting in a $145 billion award of punitive

damages: "Legal don't make it right." *Engle* v. *Liggett Group, Inc.*, App. 8a.

In making such appeals, moreover, plaintiffs' lawyers often assert to juries that the existing regulatory regimes established through democratic means are inadequate or corrupt and that jurors must step into the vacuum. At the trial level in *State Farm*, for example, the plaintiff's attorneys argued: "The only regulators of insurance companies are jurors like you. * * * [Y]ou are the regulators. We do not have objective and effective regulators of the insurance industry." App. 11a. And in another typical case, plaintiff's counsel convinced a jury to return a $60 million punitive damages award against an auto maker by arguing: "[N]obody else is going to stop this. * * * The government's not going to do anything. The only way to stop the kind of misconduct that you've heard about in this case * * * is with the amount of your punitive damages verdict. * * * *You are the regulators.*" *Rodriguez* v. *Suzuki Motor*, App. 10a (emphasis added).

Similarly, in *Frankson* v. *Brown & Williamson Tobacco Corp.*, App. 9a, the plaintiff's counsel told the jury: "We're going to ask you to send a message to the defendant * * * and not just the defendant, but the tobacco industry and to corporate America as well." William Glaberson, *Punitive Award Sought for Smoker's Widow*, N.Y. Times (Jan. 8, 2004), at B3. He added: "You have the power, and if you don't do it, who will? Not President Bush. Not Governor Pataki. Not Judge Kramer [the trial judge]." *Punitive Award Asked of Jury in Tobacco Suit*, N.Y.L.J. (Jan. 8, 2004), at 1. The jury obliged, returning $350,000 in compensatory damages and $20 million in punitive damages. William Glaberson, *$8 Million Award to Widow Punishes Tobacco Company*, N.Y. Times (Jan. 10, 2004), at B1; see also *Lopez* v. *American Home Prods.*, App. 12a (awarding $45 million in punitive damages on top of a $11.6

million compensatory award, based on an appeal to "send a message to this country," "a message to Washington").[2]

Given these tactics, it is no wonder that runaway punitive damage awards have enabled plaintiffs' lawyers to exploit juries as "an unauthorized regulatory medium." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 283 (1984) (Powell, J., dissenting). Indeed, the specter of a huge punitive damage award is often the most powerful weapon at the disposal of plaintiffs' lawyers engaged in coordinated efforts to use the civil justice system to promote regulatory ends—including restrictions on tobacco, guns, and other products—that they have failed to achieve through the democratic process.[3]

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[2] Juries, moreover, have issued some of the largest punitive damage award in cases where the defendant's conduct was in strict compliance with federal regulations. For example, in *Buell-Wilson* v. *Ford Motor Co.*, 2006 WL 2002858 (Cal. Ct. App. July 19, 2006), juries awarded $369 million and $98 million in punitive damages against Ford and DaimlerChrysler, respectively, notwithstanding the auto makers' compliance with pertinent National Highway Traffic Safety Administration standards. Such awards threaten to subvert the regulatory systems established by elected officials and expert administrative agencies. Imposing punitive damages for quasi-regulatory purposes (*e.g.*, to induce a civil defendant to take its product off the market) thus implicates not only due process but also principles of preemption. Cf. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (state fraud-on-the-FDA claim was preempted by the Medical Devices Amendments of 1976); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000) (federal motor vehicle regulations preempted state-law defective design claims predicated on the failure to install airbags).

[3] As one commentator has noted, "[t]he advent of litigation about products such as tobacco, guns, and lead paint [in the mid-1990s] went well beyond the historical interactions of regulation and litigation that have been of concern in the literature. No longer was the issue one of litigation creating incentives that overlapped with those resulting from regulation. Rather, litigation was being used as the financial lever to force companies to accept negotiated

3. The regulatory effect of large punitive awards is magnified by consolidated proceedings, such as multidistrict litigations, where plaintiffs wield tremendous pressure in settlement negotiations. As Judge Easterbrook has observed: "Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-1016 (7th Cir. 2002).

Moreover, a single large punitive damages award often serves as a bellwether for settlement proceedings, vastly enhancing the leverage of the plaintiffs' lawyers in extracting quasi-regulatory demands from a company or industry. Through the settlement process, the regulatory effect of a single state jury's award is projected outside the state's borders, such that the "practical effect" is to "control conduct beyond the boundaries of the State," *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324, 336 (1989), notwithstanding *State Farm* and the cases on which it relied. See 538 U.S. at 421.

Like limiting punitive damage awards to a single-digit multiple of compensatory damages, making clear that juries are prohibited from punishing defendants for unproven harm to non-parties would prevent juries from assuming an unauthorized and anti-democratic role as nationwide regulators of product design and business behavior.

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regulatory policies as part of the litigation. Thus litigation led to regulation, but not regulation that went through the usual rule-making process as a result of careful analysis by government regulatory agencies subject to their legislative mandates. Rather, the parties in the lawsuit negotiated regulatory changes as part of the package to end the litigation." W. Kip Viscusi, *Regulation Through Litigation* 3 (2002).

II. Allowing Jurors To Punish Or Regulate Defendants Based Upon Alleged Harm To Third Parties Violates Both Historical And Contemporary Conceptions Of Procedural Due Process.

Historical and contemporary conceptions of due process give this Court ample tools for responding to this problem. This Court has emphasized "from its first due process cases[] [that] traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). More specifically, the "Nation's history, legal traditions, and practices * * * provide the crucial guideposts for responsible decisionmaking that direct and restrain [this Court's] exposition of the Due Process Clause." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (quotations and citation omitted). Moreover, where a practice is so aberrational as to depart from the "settled usages and modes of proceedings existing in the common and statute law," *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1855), this Court will not hesitate to find that it violates due process. In short, "history and 'widely shared practice'" are "a guide to determining whether a particular state practice so departs from an accepted norm as to be presumptively violative of due process." *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 457 (1993) (plurality opinion); see *Oberg*, 512 U.S. at 421 ("abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that [a State's] procedures violate the Due Process Clause").

As shown below, neither traditional nor contemporary notions of procedural due process permit the imposition of punitive damages for alleged harms to non-parties where (a) the defendant has not had a fair, meaningful opportunity to contest, conclusively, the claims of those non-parties, or (b) the defendant lacks adequate notice that it could be punished for alleged harm to third parties. Indeed, when the Court in *State Farm* noted that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate

the merits of other parties' hypothetical claims against a defendant" (538 U.S. at 423), it was expressing a rule of law deeply rooted not only in the common law, but also in the contemporary practice of every American jurisdiction.

A. Punishing A Defendant For Alleged Harm To Third Parties Violates Due Process When The Named Plaintiff's Claim Is Not Genuinely Representative Of The Third Parties' Claims.

It has long been settled that due process entitles civil defendants to an "opportunity to answer," *Murray's Lessee*, 59 U.S. (18 How.) at 280; a "right to be heard" on the claims asserted against them, *Ownbey* v. *Morgan*, 256 U.S. 94, 111 (1921); and a chance to "present every available defense," *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972). The means by which these rights are protected may vary somewhat with "the nature of the proceeding and the character of the rights which may be affected by it." *Dohany* v. *Rogers*, 281 U.S. 362, 369 (1930). But in all cases they must be protected. As the Court put it in *Goldberg* v. *Kelly*: "The fundamental requisite of due process of law is the opportunity to be heard." 397 U.S. 254, 267 (1970) (quotations omitted).

Here, however, petitioner was denied any reasonable "opportunity to be heard" on the alleged harms to the thousands of unidentified Oregon smokers on which the jury based its punitive award. Respondent did not call any of these non-parties as witnesses at trial; she did not give notice of their identities at any point before trial; and she did not attempt to show that they had such a commonality of interest with her that any judgment in the case should be binding on those parties in later cases. In such circumstances, petitioner could not fairly investigate, much less refute, the named plaintiff's allegations of harm to these non-parties.

Allowing a jury to punish petitioner for these harms without giving it an adequate opportunity to be heard, and without procedures to ensure that any judgment will have a preclusive effect in future litigation, is a flat violation of due

process. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269; accord, *e.g.*, *Crawford* v. *Washington*, 541 U.S. 36 (2004). Yet petitioner had no opportunity to test the claims of its alleged victims, and thus no "reasonable opportunity to be heard and to present [its] * * * defense" as to those claims. *Dohany*, 281 U.S. at 362.

That is not to say that punishing defendants for harm to absent persons is *always* unconstitutional. The law has long permitted plaintiffs to bring representative suits on behalf of others similarly situated, enabling the named plaintiff to recover damages based in part on harms to others. However, for as long as the law has allowed such suits, it has insisted that the named plaintiff's claims be genuinely representative of the non-parties' claims *and* that there be such a commonality of interest that a judgment in the initial case will have preclusive effect in subsequent litigation involving those same non-parties. As we now show, neither historic nor contemporary practice allows the imposition of damages (punitive or otherwise) based on harms to non-parties where these conditions have not been satisfied.

1. *Historic Practice.* It was the general rule in equity that "all persons materially interested" in a case "ought to be made parties to the suit, however numerous they may be." *West* v. *Randall*, 29 F. Cas. 718, 721 (C.C.D. R.I. 1820) (Story, Circuit Justice). Equity made an exception, however, where "the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes,

and may be fairly supposed to represent the rights and interests of the whole." *Ibid.*[4]

Thus, Justice Story approved a representative suit against a "class" of defendants where "[t]here is no complaint * * * that the defendants now before the court do not represent effectually the interests adverse to the plaintiffs." See *Wood* v. *Dummer*, 30 F. Cas. 435, 439 (C.C.D. Me. 1824) (Story, Circuit Justice). And the Court in *Beatty* v. *Kurtz*, 27 U.S. (2 Pet.) 566, 579, 585 (1829), held that the trustees of a religious congregation could sue "in behalf of themselves and the members of the said church" because they belonged to a "voluntary society" and were bound with the non-parties by a "common interest" in the subject-matter of the suit, namely, the ownership and use of church property.

Throughout the nineteenth century, this Court repeatedly reaffirmed the necessity of proper representation *both* to ensure that the legal and factual issues in the case are fully and adequately litigated *and* to justify giving any judgment preclusive effect as to non-parties.

The leading case was *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288 (1853). It involved a dispute between the northern and southern branches of the Methodist Episcopal Church over rights to the "Book Concern," the denomination's publishing business operated for the benefit of its ministers. The complainants filed suit on behalf of themselves, the constituent conferences of the southern branch, and all 1,500 ministers associated with the southern branch, against two agents of the Book Concern, other members of the northern

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[4] The early American practice mirrored the practice in English courts. See *Discart* v. *Otes*, 30 Seld. Society 137, at xxxvii (No. 158, P.C. 1309) (1914) (holding that "a single complainant should argue the case" for "all similar complaints"); see generally Stephen C. Yeazell, *From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation*, 27 UCLA L. Rev. 514, 515 (1980) (explaining that, historically, "[common] interest has acted as a lowest common denominator" for representative actions).

branch, and the 3,800 ministers associated with the northern branch. See *id.* at 300.

The defendants asserted that a representative suit was inappropriate, but the Court disagreed. "The rule is well established," the Court observed, "that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest." *Id.* at 302.

Nonetheless, the Court also emphasized the importance of strict adherence to the traditional requirements for representative suits. Rehearsing Justice Story's discussion of such suits, the Court explained that because "the rights of the several persons may be separate and distinct," "there must be a common interest or a common right, which the bill seeks to establish or enforce." *Ibid.* Moreover, the Court cautioned that where "a few are permitted to sue and defend on behalf of the many, * * * *care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.*" *Id.* at 303 (emphasis added).

The Court thus approved the use of a representative suit where there were "some fifteen hundred persons represented by the complainants, and over double that number by the defendants," each side promoting adverse claims to a single fund. *Ibid.* But the suit could proceed—and non-parties could be bound by the resulting judgment—*only* because "[t]he legal and equitable rights and liabilities of all being before the court *by representation*, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained." *Ibid.*

This Court's insistence upon common interests and genuine representation is also highlighted by an earlier decision, *Ayres* v. *Cooper*, 58 U.S. (17 How.) 591 (1854). There the Court observed that a representative suit was

inappropriate where "[i]t is difficult to see any interest or estate in common among these several defendants, that would authorize the rights of the absent parties to be represented in the litigation by those upon whom process has been served." And in *McArthur* v. *Scott*, 113 U.S. 340 (1885), the Court held that a plaintiff could not be bound by a prior judgment in a representative suit contesting a will where the plaintiff's interest (under the terms of the will) was not represented in that suit. "[W]here a suit is brought by or against a few individuals as representing a numerous class, that fact must be alleged of record, so as to present to the court the question whether sufficient parties are before it to properly represent the rights of all." *Id.* at 395. Because the bill in equity did not identify the plaintiff as a potential beneficiary under the will, the Court concluded that "the verdict and decree were entered without any real contest, and that the heirs at law, whose interest it was to set aside the will, in fact controlled both sides of the controversy." *Id.* at 394, 395.

This linkage of genuine representation and inclusion in the judgment persisted into the twentieth century and, indeed, persists today. In *Wallace* v. *Adams*, 204 U.S. 415, 425 (1907), for example, the Court stated that "it is undoubtedly within the power of a court of equity to name as defendants a few individuals who are in fact the representatives of a large class having a common interest or a common right—a class too large to be all conveniently brought into court—and make the decree effective not merely upon those individuals, but also upon the class represented by them." And in *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 367 (1921), the Court explained that "[i]f the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented." Of course, binding the non-parties was essential to make the decree "effective" and to avoid "conflicting judgments." *Ibid.*

Traditional practice in state courts considering punitive damage awards likewise reflects this Court's concerns about the fairness of representative litigation to parties and non-parties alike. As one scholar has noted: "Historically, * * * punitive damages, even when regarded as punishment, were consciously limited to the amount necessary to punish the defendant for the wrong done, and the harm caused, *to the individual plaintiff only.*" See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 628 (2003) (emphasis added).

For example, the court in *Phelin* v. *Kenderdine*, 20 Pa. 354, 362 (1853), upheld an award of punitive damages to a father who established a claim for the seduction of his daughter, but agreed with the defendant that "the jury [could] *not* award to the father any part of the damages which belong to the daughter." See also *Stevenson* v. *Belknap*, 6 Iowa 97, 101 (1858) (holding that both father and daughter could recover punitive damages but that each was limited to "damages resulting to the plaintiff alone, and not to another"); *Coil* v. *Wallace*, 24 N.J.L. 291, 314-315 (1854) (holding that each victim in a seduction case was entitled to a separate punitive damages award "not flagrantly excessive or disproportionate to the injury"). The courts in these cases understood that the damage to the father was *of a different kind* than the damage to his daughter, and that the interests of father and daughter were insufficiently common, such that he could not fairly represent her. Accordingly, even though a single act by a single defendant resulted in harm to both father and daughter, those harms were distinct and neither victim could recover for the harms done to the other.[5]

[5] Other courts have even imposed evidentiary restrictions to ensure that juries could not punish defendants for alleged harms to persons not before the court. *E.g.*, *Weaver* v. *Bachert*, 2 Pa. 80, 82 (1845) (explaining that the defendant could not "be doubly exposed to vindicatory damages"); *Foster* v. *Scoffield*, 1 John. 297, 299 (N.Y.

2. *Contemporary Practice.* The historic practice of requiring that the plaintiff have a genuinely common interest with any non-parties for which she seeks recovery has continued since the adoption of the Federal Rules of Civil Procedure in 1938. Just two years after promulgation of the Rules, this Court held in *Hansberry* v. *Lee*, 311 U.S. 32, 45-46 (1940), that a non-party whose interests were not adequately represented by the named plaintiff in a prior representative suit could not be bound by the judgment in that suit.

The plaintiffs in *Hansberry* sued to enjoin the defendants from breaching a restrictive covenant that forbade the sale of certain property to African-Americans. The defendants challenged the covenant on the ground that it had not been approved by the requisite number of property owners, but the state court held that litigation of that issue was foreclosed by a prior decision in a suit brought by a property owner, "in behalf of herself and other property owners in like situation," to enforce the covenant. *Id.* at 39.

This Court reversed, holding that the African-Americans seeking to *invalidate* the covenant had not been adequately represented by the parties who earlier sought to *enforce* that covenant (that is, they lacked a common interest), and thus could not be bound by the decision in the earlier suit. *Ibid.* Holding a non-party to a judgment obtained by parties whose "substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Ibid.* As the Court later stated, citing *Hansberry*: "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co.*

Sup. Ct. 1806). As the Michigan Supreme Court explained the general rule: "The foundation of exemplary damages * * * rests on the wrong done willfully to the complaining party, and not to wrong done without reference to that party." *Ganssly* v. *Perkins*, 30 Mich. 492, 495 (1874).

v. *Shutts*, 472 U.S. 797, 812 (1985); accord *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996); *Blonder-Tongue Labs., Inc.* v. *University of Ill. Found.*, 402 U.S. 313, 329 (1971).

Modern practice under Rule 23 and its state-law analogs reflects this Court's insistence on a common interest between a representative plaintiff and the nonparties she seeks to represent. To prosecute a class action under these rules, the named plaintiff must demonstrate not only that "there are questions of law or fact common to the class," but also that her claims are "typical" of the non-parties' claims and that she will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a); see also *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997) (describing the "threshold requirements" for class certification). To that end, this Court has held that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members," and that the requirements of Rule 23(a) "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 156 (1982) (quotations omitted). Moreover, even where class treatment of some issues is appropriate, the law may require individualized treatment of others, including damages. See Fed. R. Civ. P. 23(c)(4); *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977).[6]

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[6] Even where a plaintiff satisfies due process and the requirements of Rule 23(a), it may not be appropriate to certify a class. Under Fed. R. Civ. P. 23(b)(3), for example, the court must further "find[] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." This standard will rarely if ever be satisfied in the context of smoking-and-health litigation. See, *e.g.*, *Barnes* v. *American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

The commonality and typicality requirements also ensure that named plaintiffs' claims genuinely represent non-parties' claims. *Falcon*, 457 U.S. at 157 n.13 (describing the requirements as "guideposts for determining whether * * * the named plaintiff's claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence"). If the named plaintiff's claim is typical of the non-parties' claims, and if the other requirements for representation are satisfied, proof of the named plaintiff's claim will establish the common elements of the non-parties' claims, and a defense to the named plaintiff's claim will serve as a defense to the non-parties' claims. In short, "as goes the claim of the named plaintiff, so go the claims of the class." *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998); *Sprague* v. *General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998). Only if this is true—if the named plaintiff satisfies all requirements for a representative suit—will the defendant have had a fair opportunity to be heard on all the claims asserted against it.

Moreover, only if the named plaintiff's claim is genuinely representative of the non-parties' claims can the parties and non-parties alike be bound by the judgment. This Court has made clear that non-parties are bound by judgments in representative suits only where their interests were fairly represented. See *Shutts*, 472 U.S. at 812; *Hansberry*, 311 U.S. at 41; *Ben-Hur*, 255 U.S. at 367. The defendant has as much interest as do the non-parties in the preclusive effect of any judgment rendered in a representative suit, and compliance with Rule 23 ensures that litigation will finally resolve all of the representative claims as to parties and non-parties alike.

Absent compliance with Rule 23, however, the defendant faces a real prospect of multiple liability for the same injuries. If the jury awards punitive damages to one plaintiff based in part on alleged injuries to non-parties, and if the judgment on that jury's verdict is not binding on those non-parties, the defendant may be subject to liability in future lawsuits by the

non-parties seeking compensatory and punitive damages of their own. See *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 608-609 (7th Cir. 1997) (Posner, J.) ("A plaintiff's award of punitive damages is not limited by awards made to previous plaintiffs complaining of the same act of the defendant"); *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) (Friendly, J.) ("We know of no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments").

Exposure to such duplicative liability violates the due process principle that "in civil cases *** no man shall be twice vexed for one and the same cause." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-169 (1873); accord *United States* v. *Oregon Lumber Co.*, 260 U.S. 290, 301 (1922). As the Court explained in *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 75 (1961), a property owner "is deprived of due process of law if he is compelled to relinquish [his property] without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment."

The Court in *State Farm* was well aware of this problem. That is no doubt why it stated that punishment based on non-parties' "hypothetical claims" was improper because it would "create[] the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." 538 U.S. at 423; see also *Gore*, 517 U.S. at 593 (Breyer, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the *** damages that subsequent plaintiffs would also recover").

Compliance with the requirements of representative actions is thus essential to recovery for harms to non-parties, to ensure both full and fair litigation of the issues and final resolution of the representative claims. As this Court has recognized, "Rule 23 provides specific rules for delineating

the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 266 (1972). Only upon the named plaintiff's showing that her claim is truly representative of non-parties' claims can a court be confident that the defendant will have an opportunity to present every defense available to those claims. And only upon such a showing can the defendant and non-parties alike be certain that the judgment will preclude subsequent litigation of the same issues. As the Eighth Circuit put it in a recent decision, "[p]unishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff * * * deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure." *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004).

3. Here, there has been no finding that respondent's fraud claim is genuinely representative of any non-party's claim or that class-wide treatment is otherwise appropriate. Indeed, respondent did not bring this suit as a class action, and for good reason. Fraud claims such as hers rarely are suitable for class treatment, because individualized issues of reliance, causation, and damage are not readily susceptible to generalized proof. *E.g.*, *Castano*, 84 F.3d 745; *Broussard*, 155 F.3d at 341-342; *Andrews* v. *AT&T Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996).

To conclude that petitioner was responsible for harm to other smokers in Oregon, the jury would have had to find, by clear and convincing evidence, not only that petitioner made material misrepresentations, but also that all those smokers (1) were aware of the alleged misrepresentations, (2) actually and justifiably relied on those misrepresentations, and (3) suffered physical injuries that were actually caused by their reliance on the misrepresentations. See *Conzelmann* v. *Northwest Poultry & Dairy Prods. Co.*, 225 P.2d 757, 764-765 (Or. 1950) (defining the elements of common-law fraud); *Williams* v. *Philip Morris, Inc.*, 48 P.3d 824, 830 (Or. App. 2002). These are highly individualized issues of fact that

depend on the circumstances of each alleged victim's case; they are not readily susceptible to class-wide proof.

For all these reasons, a plaintiff who could not properly represent non-parties in a class action, and who could not bind them in subsequent litigation, should not be permitted to recover punitive damages based on alleged harm to them. This conclusion comports with "traditional practice" for at least two centuries (*Oberg*, 512 U.S. at 430), and it ensures that juries and courts, in calculating punitive damages, will not adjudicate "other parties' hypothetical claims against a defendant," *State Farm*, 538 U.S. at 423. Because respondent did not meet the settled requirements for representing third parties, petitioner did not have an adequate opportunity to defend against those claims, and imposition of punitive damages based on those claims violated due process.

4. None of this is to say that a defendant's conduct toward non-parties is wholly irrelevant to the calculation of punitive damages. As this Court has said, because "repeated misconduct is more reprehensible than an individual instance of malfeasance," the existence of repetitive conduct may be relevant as long as courts "ensure the conduct in question *replicates* the prior transgressions." *Ibid* (emphasis added). The fact that a defendant has engaged in similar conduct toward others likewise may be relevant to whether the defendant acted intentionally—also an issue of reprehensibility. *Ibid*. Thus, in appropriate cases, evidence of prior misconduct may well be admissible on the issue of punitive damages.

But this simply underscores the importance of adequate instructions to ensure that a jury's proper *consideration* of prior conduct in the reprehensibility analysis does not lead to improper *punishment* for that conduct. As this Court has recognized, "[p]unitive damages pose an acute danger of arbitrary deprivation of property," in part because "[j]ury instructions typically leave the jury with wide discretion in choosing amounts." *Oberg*, 512 U.S. at 432. There is no

guarantee, of course, that a jury will follow an instruction not to punish a defendant for harms to non-parties. But in the absence of such an instruction, the risk is great that a jury *will* in fact punish a defendant for the wrong reasons. Cf. *State Farm*, 538 U.S. at 422 ("A jury must be instructed * * * that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred"). The failure of the courts below to provide for such instruction was unconstitutional.

B. Allowing Plaintiffs To Recover Punitive Damages For Harms To Non-Parties Without Demonstrating That Their Claims Are Genuinely Representative Of The Non-Parties' Claims Also Deprives Defendants Of Reasonable Notice Of The Law's Requirements.

The lower court's decision to allow the jury to punish petitioner for harm to third parties also violated the core due-process principle that a defendant is entitled to adequate notice of the conduct for which it may be punished. As this Court has held, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. A State does not provide adequate notice that defendants may be liable for alleged harms to non-parties where the named plaintiff is not required to satisfy the requirements for class certification or otherwise to demonstrate that her claim is genuinely representative of non-parties' claims. Nor does a defendant receive adequate notice of liability where a jury is permitted to act as regulators of industry-wide practice.

1. This Court has recognized that "businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Just as businesses are presumed to consult "relevant legislation" that restricts their activities, so

too may they rely on laws and procedural rules that limit the scope of their potential liability.

The States' class action rules require plaintiffs to satisfy extensive requirements before allowing them to recover for injuries to a class of non-party plaintiffs. See ABA Section of Litigation, *Survey of State Class Action Law—2005* (2005). Oregon is no exception. Much like the Federal Rules of Civil Procedure, Oregon's rules provide that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all *only if*," among other things:

- "joinder of all members is impracticable";
- "[t]here are questions of law or fact common to the class";
- "[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class"; and
- "[t]he representative parties will fairly and adequately protect the interests of the class."

Or. R. Civ. P. 32A. "[I]n addition, the court [must] find[] that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," in light of factors such as "[t]he extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Rule 32B. Moreover, where a class proceeding is appropriate only as to "particular claims," "[e]ach subclass must separately satisfy all requirements" except numerosity. Rule 32G.

A defendant such as petitioner, charged with notice of these rules, will understand that its ability to challenge the propriety of a class action turns on the factors outlined above. Absent a rule that permits individual plaintiffs to recover for harms to non-parties by complying with *other* procedures, however, no defendant would reasonably infer that it could be subjected to liability for harms to non-parties where a plaintiff does *not* comply with the class action rules (or at least substantively equivalent rules).

Put another way, the class action rules provide *minimum* requirements for recovering damages for non-parties' harms, and the only reasonable inference to be drawn from Oregon's class action rules is that a civil defendant will be subjected to class-wide liability "only if" (Rule 32A) the plaintiff satisfies those requirements. This is especially so in light of the body of precedent, discussed in Part II.A., holding that multiple claims against a defendant may be resolved in a single case only if the named plaintiff has satisfied the requirements for a representative action.

2. Businesses also lack adequate notice that juries in cases brought by individual plaintiffs will displace governmental authorities as regulators of corporate conduct. "Punitive damages, unrelated to compensation for any injury or damage sustained by a plaintiff, are 'regulatory' in nature rather than compensatory." *Silkwood*, 464 U.S. at 274-275 (Powell, J., dissenting). Ordinarily, regulation is a task committed by statute to government agencies that are broadly aware of the risks and benefits of corporate conduct and thus are able to calculate the level of punishment necessary to deter future misconduct without over-deterring and adversely affecting the market generally.[7]

By contrast, juries in individual tort suits are charged with resolving only specific disputes between "adversaries asserting specific claims or interests peculiar to themselves." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 n.10 (1974). Jurors hear only the facts presented by the parties—subject to rules of evidence that limit the scope of the parties' presentations—and they have no legal mandate (let alone the capacity) to undertake a broader investigation of circumstances beyond the case. This lack of ability to

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[7] See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 878-881 (1998); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 322-327 (1998).

gather information stands "in sharp contrast to the political processes in which the [legislature] can initiate inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports, thus making a record for plenary consideration and solutions." *Ibid.* In sum, juries "may be competent to determine and assess compensatory damages," but "are unlikely, *** to have even the most rudimentary comprehension of what reasonably must be done to assure the safety of *** the public." *Silkwood*, 464 U.S. at 285 (Powell, J., dissenting).

For all these reasons, no company can be considered to be "on notice" that a jury will be allowed to displace elected officials as the principal regulators of its business. For this reason too, it is a violation of due process for a trial court to refuse a jury instruction telling the jury that it is not to punish a defendant for alleged harm to third parties.

* * * * *

Private suits for punitive damages should not be used "as a platform to expose, and punish, the perceived deficiencies of [the defendant's or the industry's] operations throughout the country." 538 U.S. at 420. This Court should enforce that principle here by clarifying that juries considering punitive damages must, at the option of the defendant, be instructed that they may not punish the defendant for unproven harms to non-parties.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

JAN S. AMUNDSON
QUENTIN RIEGEL
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-3000

CONAN P. GRAMES
DIANE BIERI
Pharmaceutical Research & Manufacturers of America
950 F Street, N.W., Suite 300
Washington, D.C. 20004
(202) 835-3400

DONALD D. EVANS
American Chemistry Council
1300 Wilson Blvd.
Arlington, Virginia 22209
(703) 741-5000

GENE C. SCHAERR
Counsel of Record
STEFFEN N. JOHNSON
JEFFREY M. ANDERSON
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

LINDA T. COBERLY
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

MARIA GHAZAL
Business Roundtable
1717 Rhode Island Ave., N.W. Suite 800
Washington, D.C. 20036

Counsel for Amici Curiae

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APPENDIX

APPENDIX A

The **National Association of Manufacturers** ("NAM") is the oldest and largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing in America's economic future. Many of the NAM's members would face enormous financial risk if, as the court below held, juries could punish corporate manufacturers for alleged harm to non-parties without even establishing that those parties are similarly situated to the named plaintiffs. The resulting liability could well bankrupt many manufacturers. At a minimum, it would severely discourage the development, manufacture, and sale of a wide range of products.

The **Pharmaceutical Research and Manufacturers of America** ("PhRMA") is a voluntary, nonprofit association that represents more than 100 of the country's leading pharmaceutical research and biotechnology companies. PhRMA's members discover, develop, and manufacture products—including prescription medicines—that allow millions of patients worldwide to live longer, healthier, and more productive lives. In 2005, PhRMA's members alone annually invested some $39.4 billion in discovering and developing new medicines. PhRMA's members are among the most frequent victims of arbitrary punitive damage verdicts, and of appeals by plaintiffs' lawyers to punish corporate defendants for unproven harm to non-parties. Such practices deter the development and drive up the cost of potentially life-saving medicines—medicines that have passed the most rigorous and extensive safety testing in the world and secured United States Food and Drug Administration ("FDA") approval before going to market.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry, a $550 billion enterprise and a key element of the nation's economy. ACC members apply the science of chemistry to make innovative products and services that make the lives of people throughout the country and abroad better, safer, and healthier. ACC is committed to improving environmental, health, and safety performance through Responsible Care®; common sense advocacy designed to address major public policy issues; product testing; and health and environmental research. Many ACC members can be, and have been, subjected to punitive damages awards based on unproven harm to non-parties. The threat of such awards deters ACC members from engaging in nationwide practices that achieve economies of scale and other efficiencies needed to provide special benefits to consumers and maintain uniform quality across their operations.

The **Business Roundtable** is an association of chief executive officers of leading U.S. corporations with millions of shareholders and a combined workforce of more than 10 million employees in the United States. Member companies comprise nearly a third of the total value of the U.S. stock market and represent nearly a third of all corporate income taxes paid to the federal government. Since 1972, Business Roundtable has been devoted to examining policy issues affecting the U.S. economy and developing positions that reflect sound economic and social principles. Business Roundtable has an interest in ensuring that the Court is fully informed about the manner in which current punitive damages procedures—and in particular the practice of allowing juries to punish corporate defendants for unproven harm to non-parties—conflict with established historical and contemporary practice and thus violate the Due Process Clause.

APPENDIX B

Examples of Appeals to Juries for Punitive Damages

1. ***GMAC* v. *Baymon*, No. 95-0072 (Humphreys County, Miss. Cir. Ct. 1997), *rev'd*, 732 So. 2d 262 (Miss. 1999).**

The plaintiff sued GMAC for breach of contract and fraud, claiming that she was overcharged by $762 for collateral protection insurance on her vehicle. During closing argument, the plaintiff's counsel asked the jury to think about "the other victims just like [the plaintiff]," whom he described as "working people on the economic edge, struggling, predominantly *** African-Americans." Tr. 889:26-29, 967:19-23. Plaintiff's counsel then urged the jury to award punitive damages for the "600,000 other Menola Baymon's in Humphreys County, in Sunflower County, in Holmes County, in Memphis, Tennessee, and everywhere else in this country." Counsel told the jury: "You can change the way this insurance is done *** [t]he way people are ripped off across the country, you can stop it." Tr. 967:13-15, 968:19-24, 970:4-6. The jury awarded $35,000 in compensatory damages and another $5 million in punitive damages, 143 times the compensatory award.

2. ***Brown* v. *Borg Warner Corp.*, No. 95-1922 (El Paso, Tex. County Ct. 1998), *aff'd*, No. 08-98-00213-CV (Tex. App. 1999) (unpublished).**

The plaintiff sought recovery for harm from exposure to asbestos in disc brakes. During closing argument, his counsel asked the jury to award punitive damages:

> Ladies and gentlemen, if you feel that what happened to William Brown was a unique situation, if you feel that he was the only mechanic who breathed that dust, if you feel that he was the only worker that was abused by corporate irresponsibility, if you feel that he is the only victim, then perhaps exemplary damages are inappropriate. ***

> But if you feel like I do and if you feel that the evidence said that the Borg Warner Corporation and the asbestos industry ignored for decades knowledge about asbestos and that the Borg Warner Corporation and the asbestos industry turned its back on safety and closed its eyes on the health of others, then it is your duty and responsibility to award a substantial amount of exemplary damages. * * *
>
> And it's your responsibility, not to William Brown individually, but to all the William Browns * * * out there doing their job. It is your responsibility to those people. * * *
>
> And let me assure you, ladies and gentlemen, that your voice will be heard. It will be heard in Chicago by the Borg Warner Corporation. It will be heard by an industry and it will be heard by all the William Browns of the world, and by all the corporations that would turn their back and close their eyes to the safety and welfare of the working people. * * *
>
> [W]hen you award exemplary damages, you establish standards of conduct, standards of decency, standards of corporate accountability, standards of corporate responsibility.

Tr. 34. The jury awarded $200,000 in punitive damages.

3. *Bullock* v. *Philip Morris, USA, Inc.*, No. BC249171 (Los Angeles County, Cal. Super. Ct. 2005), *aff'd*, 138 Cal. App. 4th 1029 (Cal. Ct. App. 2006), *pet. for rev. filed*, No. S143850 (Cal. May 31, 2006).

At trial in a case brought by a smoker against Philip Morris, the plaintiff introduced evidence that cigarette smoking injures thousands of people throughout the state and the nation, and counsel referred to this evidence in his opening statement and closing argument. RT 948, 1354-1355, 4119-4122, 4191-4192. Specifically, counsel argued that for every smoker who sues Philip Morris, 28,000 people have

died from cigarette smoking; and he urged the jury to punish Philip Morris for each death.

> During closing argument, counsel told the jury:
>
> Less than 3,000 people died in the Twin Towers terrorist attack. When I say "less than," that sounds really weird because what an unbelievable human toll; but in the terms we are talking about here, just so we can bring this down, that's a 30-day toll in California alone right now from smoking cigarettes.
>
> Philip Morris is a resourceful foe. Never, ever think Philip Morris is done or cornered or has no options ever. Picture this, please: Special Forces in the desert, after a lot of work and effort, they corner bin Laden. "I won't do it again. I won't do it any more." I could go back in history to bigger worse people and bigger worse atrocities, but think about the concept of what you heard today, that after an evildoer, a wrongdoer, is run to the ground, all that person has to say is, "Oh, okay. I won't do it any more." * * *
>
> And the last thing the judge mentioned is that the punitive damages have to bear a reasonable relationship to the damages sustained by Betty Bullock, whatever that means. And, of course, that is stuff that lawyers, appellate lawyers, and judges and appellate judges talk about, but that's not today.

138 Cal. App. 4th at 1058 nn.19-20.

In addition to $850,000 in compensatory damages, the jury awarded $28 billion in punitive damages, amounting to $1 million for each of 28,000 people mentioned by plaintiff's counsel.

4. *Diamond* v. *General Am. Life Ins. Co.*, No. CV96-02277 (Maricopa County, Ariz. Super. Ct. 1999).

The plaintiff sued General American for failure to pay disability benefits. At trial, the plaintiff was allowed to

introduce evidence that General American had identified 58 policyholders with large potential claims and attempted to buy out their policies. Plaintiff's counsel told the jury in opening statement that they should punish General American "for what [it] did to all of the people whose faces you don't see in this courtroom but whose lives have been as affected [as plaintiff's], if not worse." 2 Tr. 73-74. During closing argument, plaintiff's counsel made repeated references to the "hit list" of other alleged victims. 12 Tr. 57, 58, 77. The jury awarded the plaintiff $58 million in punitive damages—exactly 58 times the amount of compensatory damages. As the trial court recognized, it appeared "almost to a certainty" that the jury arrived at its punitive damage figure by multiplying $1 million by the 58 policyholders. App. at 57 (June 3, 1999 Order).

5. *Aguilar* v. *Ashland Oil Co.*, JCCP No. 2967 (Los Angeles County, Cal. Super. Ct. 1998), *rev'd*, No. B128469 (Cal. Ct. App. 2000) (unpublished).

The plaintiffs sued Ashland Oil Company and other chemical companies for injuries arising from their exposure to organic solvents and other chemicals at their workplace. The plaintiffs alleged that the chemical manufacturers failed to warn them about health risks associated with their products. The jury found the defendants liable and awarded the plaintiffs more than $25 million in compensatory damages.

The trial court began the punitive damages phase by instructing the jury that it should "make an example of [defendants] to the whole world." RT 3902. Plaintiffs' counsel then argued that the purpose of the jury's punitive award should be "to say, corporate America, you can't do this anymore * * * [y]ou've got to start doing the right thing and since they did not do the right thing and * * * since they had a conscious disregard, you, ladies and gentlemen, must do the right thing for them." RT 3923-3924.

After these closing arguments, the court again addressed the jury:

> How much money is it going to take to send home a message to five of the biggest corporations in the world that this isn't going to be done anymore. *** So pick a figure and say, let's send a notice out to the world, this is the price in Los Angeles County. *** Now, do you want to set any example for the world? It is not just the people here, or the people in Los Angeles County or the State of California or the United States, it is world wide. These people sell chemicals every place, you see. Do we want to send a message that this conduct will not countenance [sic] in the least in Los Angeles Counties [sic]? That is your decision. *** Every chemical manufacturer in the United States that makes these chemicals is going to see this decision and say, boy, we better be very careful on hw we distribute this product, we better go the extra mile. If we don't, you know, we are going to get burned.

RT 3935-3942. The jury awarded the plaintiff $760 million in punitive damages.

6. *McKendry* v. *General Am. Life Ins. Co.*, No. CIV 96-0754 (D. Ariz. 1999).

The plaintiff sued General American for bad faith in connection with its decision to terminate his long-term disability benefits. In asking for punitive damages, plaintiff's counsel told the jury:

> [R]ight now, you are probably the eight most knowledgeable people about how disability insurance should be operated, and shouldn't be operated. Probably the eight most knowledgeable in this state, even more knowledgeable than adjusters who maybe work in the field, because you have seen evidence from the top to the bottom about how the system work.
>
> You know if—if Senator McCain wanted to pass a law that would address the kind of issue you heard, he'd

> have to hold hearings, and he'd have to caucus with his supporters and other people in the Senate. And even if it was his top legislative priority, there's a good chance he would never get anything passed to address this problem.
>
> And if Judge Rosenblatt wanted to do something, there's really not anything that he can do. And our—in our government, our system puts that power in your hands for a brief period of time. And then you lose the power again, and you may never get that kind of power to influence the way the world works ever again.

Tr. 1912. Plaintiffs' counsel also discussed harms to non-parties, arguing:

> So you've got the harm that was done to Steve [the plaintiff], you've got the harm that was done to the other 57 people targeted, you've got the harm to the other people in this book of business who the * * * witnesses said were treated the same way, and you've got the harm to other * * * insureds, and you have the harm to people insured by [other companies], who wind up having their claims handled in the [same] way.

Tr. 1915. The jury awarded the plaintiff $17 million in punitive damages, more than 48 times the compensatory award.

7. *Engle* v. *Liggett Group, Inc.*, No. 94-08273 (Dade County, Fla. Cir. Ct. 2000), *rev'd*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), *aff'd in part and rev'd in part*, 2006 WL 1843363 (Fla. July 6, 2006).

The plaintiffs sued several tobacco companies for injuries allegdly caused by smoking. During closing argument, plaintiffs' counsel told the jury: "And let's tell the truth about the law, before we all get teary-eyed about the law. Historically, the law has been used as an instrument of oppression and exploitation. * * * If you admit that you sell a product that causes cancer—I admit my product causes

cancer—and if you also admit it's also addictive, get out of the business. That's the only moral, ethical, religious, decent judgment to make * * *. If you sell a product which causes cancer and which is addictive, stop selling it. Stop selling it, because you know it's doing unbelievable harm to your fellow Americans. * * * [The defendants say] [i]t's a legal product. It's a legal product. Legal don't make it right. Legal don't make it right." 853 So. 2d at 459-460.

8. *Frankson* v. *Brown & Williamson Tobacco Corp.*, 781 NY.S.2d 427 (Kings County, N.Y. Sup. Ct. 2004), *aff'd sub nom. Frankson* v. *Philip Morris Inc.*, 2006 WL 1851266 (N.Y. App. Div. July 5, 2006).

In another smoking case, plaintiff's counsel asked the jury "to send a message to the defendant * * * and not just the defendant, but the tobacco industry and to corporate America as well." William Glaberson, *Punitive Award Sought for Smoker's Widow*, N.Y. Times (Jan. 8, 2004), at B3. Counsel continued, "You have the power, and if you don't do it, who will? Not President Bush. Not Governor Pataki. Not Judge Kramer." *Punitive Award Asked of Jury in Tobacco Suit*, N.Y.L.J. (Jan. 8, 2004), at 1. The jury awarded the plaintiff $20 million in punitive damages, nearly 60 times the compensatory award.

9. *Batson* v. *Wyeth* and *Wirt* v. *Wyeth*, Nos. 99CV0306 & 99CV0307 (Coos County, Ore. Cir. Ct. 2000).

The plaintiffs in these cases alleged that the pharmaceutical Pondimin (sometimes included in the combination known as "fen-phen") was unreasonably dangerous. During closing argument, counsel told the jury:

> There's been a lot of times in this case that I have kind of felt sorry for you. The testimony, although you've listened to it well, has sometimes been a little bit boring, and sometimes been a little bit tedious, but right now I envy you. You are more powerful right now than I'll ever be. You are more powerful than anyone in this

> room, in this city, in this state, or in this nation with regard to what you can say to a huge drug company and how you can get them to change.
>
> My faith, ladies and gentlemen, in the jury system is whole, it is complete. I believe that as you sit here today, that you are the voice of this community, this county, this state, this nation. I believe that as you sit here today, you sit upon the shoulders of every man and every woman that ever sat in that seat before. I believe that you sit upon the shoulders of giants. I believe that you have the ability to make huge changes in the pharmaceutical industry and to make a huge change in this company. Send them a message.
>
> Your verdict is going to be read by their employees. Your verdict is going to be read by their CEO and by their board of directors, and by boards of directors of every pharmaceutical company in the world.

Tr. 195-197. The jury awarded $25.35 million in punitive damages.

10. *Rodriguez* v. *Suzuki Motor Co.*, No. 902-08691 (St. Louis, Mo. Cir. Ct. 1995), *rev'd*, 936 S.W.2d 104 (Mo. 1996).

The plaintiff sued an auto maker for injuries resulting from the rollover of a sport-utility vehicle. Plaintiff's counsel argued to the jury: "[Y]our job *** is to stop that line of victims from growing anymore, *** to stop that indifference, ***. It needs to be stopped right now, right here, before somebody else loses their life or gets maimed like [the plaintiff] has been." Counsel continued: "[N]obody else is going to stop this. *** The government's not going to do anything. The only way to stop the kind of misconduct that you've heard about in this case *** is with the amount of your punitive damages verdict. *** You are the regulators." The jury awarded the plaintiff $60 million in punitive damages.

11. *Campbell* v. *State Farm Mut. Auto. Ins. Co.* (Salt Lake County, Utah Dist. Ct. 1996), *aff'd in part and rev'd in part*, 65 P.3d 1134 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

The plaintiff sued State Farm for bad faith, fraud, and intentional infliction of emotional distress in connection with State Farm's failure to settle a lawsuit within the policy limits. During closing argument, counsel told the jury: "The only regulators of insurance companies are juries like you. You are the ones that hear, investigate and listen to the evidence and impartially make decisions regarding the actions of insurance companies.* * * Why are you important? Because you are the regulators. We do not have objective and effective regulators of the insurance industry." J.A. 3217a-3218a (No. 01-1289). The jury awarded $145 million in punitive damages, on top of a $2.6 million compensatory award.

12. *City of Modesto* v. *Dow Chem. Co.*, Nos. 999345 & 999643 (San Francisco County, Cal. Super. Ct. 2006).

The City of Modesto, California sued dry cleaners, makers of perchloroethylene, and makers of dry cleaning equipment, alleging that perchloroethylene was defective and that the defendants had contaminated city water. During closing argument, the City's counsel argued: "What would a responsible corporation do if they learned that their product was in 10 percent of the wells in the country? * * * If you know that your product has caused a problem of that magnitude, you can't blame it on a mom-and-pop dry cleaner. That couldn't do something all over the country. " Tr. 6630:25-26, 6631:6-9 (May 23, 2006)."

Later in the argument, counsel told the jury: "[T]hey acted in conscious disregard of cities like Modesto and other communities throughout the country. After all, if we're talking about 10 percent of the wells in America, you're talking about the water supply for very large numbers, probably millions of people." Tr. 7017:7-12 (May 31, 2006).

"In the last analysis," counsel concluded, "this is really about corporate accountability. * * * There's a problem in a world without consequences where adults, and in this case corporations, aren't held to standards that every one of us are held to every day, and that problem is that the very things we have laws to deter are ignored. * * * Whatever you do, it will be a message. Make sure that it's a message to these defendants that says never again, and that's the right thing to do." Tr. 8079 (June 13, 2006). The jury awarded $3.2 million in compensatory damages and another $175 million in punitive damages.

13. *Lopez* v. *Am. Home Prods.*, No. 99-07-37725-CV (Jim Wells County, Tex. Dist. Ct. 2001).

The plaintiff alleged that fen-phen caused certain adverse health effects. In asking the jury for punitive damages, her counsel argued: "I think an adequate amount of damage, an adequate amount of punishment, a message to Washington, New Jersey and Pennsylvania would be $107 million if her heart was damaged by 10 percent." Tr. 194-196 (Apr. 2, 2001). The jury awarded $45 million in punitive damages.

14. *Gunderson* v. *Sandoz Pharms. Corp.*, No. 94-CI-04680 (Jefferson County, Ky. Cir. Ct. 2004), *aff'd in part*, *Sandoz Pharms. Corp.* v. *Gunderson*, 2005 WL 2694816 (Ky. Ct. App. Oct. 21, 2005).

The plaintiff sued the manufacturer of the medication Parlodel, alleging that it had caused the decedent's death. In support of a request for punitive damages, plaintiff's counsel argued:

> A lot of times when I sit back and you guys, too, probably, and you watch the news, or you read the newspaper * * * about corporate misconduct or corporate misdeeds, and you say, well, you know, there's nothing I can do about it, there's nothing I can do about it, but as a collection of 12 people, there's a heck of a lot you can do about it. Collection of you all together looking at the

> facts and deciding it based upon the facts and the law that the judge gives you, then you can make a real statement. *** [I]f you're going to deter people that operate out of Switzerland all over the world, then you've got to decide how in the world do we do it.

The jury awarded the plaintiff $11.3 million in punitive damages.

15. *Ingram* v. *Liberty Nat'l Life Ins. Co.*, No. CV-96-62 (Chambers County, Ala. Cir. Ct. 2002), *rev'd on other grounds*, 887 So. 2d 222 (Ala. 2004).

The plaintiff in this case sued Liberty National for fraud, suppression, deceit, wantonness, civil conspiracy, bad faith, and conversion in connection with the sale of an insurance policy. In closing argument, the plaintiff's counsel told the jury: "Might as well throw seven million to put a heart into this bunch over here. *** I hope and pray that y'all will make it worth that for the rest of the people in Chambers County, that this will stop. It will have effects all over Alabama and everywhere else that they've got agents." Tr. 759-760. The jury awarded the plaintiff $200,000 in compensatory damages and another $3 million in punitive damages.

16. *Coffey* v. *Wyeth*, No. E-167,334 (Jefferson County, Tex. 2004).

In this fen-phen case, plaintiffs' counsel asked the jury,: "How many times do you have to pick up newspapers and keep reading over and over again, the drugs on the market had to be taken off because they're dangerous, or because some black box warning has to be given because they're dangerous, after years of being on the market." Tr. 120-121. Counsel then suggested that "[t]he number ought to be over what they made off selling this drug and going through all the shenanigans that they went through, significantly over it. Because only then will they say, oops, this is not a profitable

way to do things." Tr. 134. The jury awarded $900 million in punitive damages.

17. *Cook* v. *Rockwell Int'l Corp.*, No. 90-CV-00181 (D. Colo. 2006).

The plaintiffs sued for nuisance, alleging that the defendants had caused radioactive contamination of their properties, decreasing their value. Plaintiff's counsel asked the jury to "tell Rockwell, to tell Dow, corporate America, even DOE, this will not be tolerated anymore in our communities. Stop the wrongdoing. Stop the lying for once in 50 years, give the neighbors some justice." Tr. (Jan. 21, 2006). The jury awarded $200 million in punitive damages.

18. *Sunburst Sch. Dist. No. 2* v. *Texaco Inc.*, No. CDV-01-179(a) (Cascade County, Mont. Dist. Ct. 2004).

A group of 75 Montana landowners sued Texaco seeking damages for the effects of a gasoline pipeline leak that occurred in 1955 at a now-defunct refinery. Texaco sought to introduce evidence that it had cooperated with Montana's Department of Environmental Quality to investigate and remediate the site, but the trial court excluded the evidence. See Kathleen A. Schultz, *Texaco to Appeal Sunburst Ruling*, Great Falls (Mont.) Tribune (Aug. 20, 2004). In closing argument, plaintiffs' counsel urged the jury to "send a message" to "others in the industry," to "warn [them] as to what the standards should be." Tr. 3082, 3107 (Aug. 18, 2004). The jury awarded $25 million in punitive damages. See Schultz, *supra*.

19. *Avco Corp.* v. *Interstate Sw. Ltd.*, No. 29,385 (Grimes County, Tex. 278th Dist. Ct. 2005), *appeal docketed*, No. 15-05-00860-CV (Tex. App.).

In this commercial fraud case relating to the manufacture of allegedly defective aircraft parts, plaintiff's counsel asked the jury to impose a large punitive damages award because "[t]hey are not going to redesign this crankshaft based upon your verdict. They are not going to do anything. * * * They

are still excusing it." Tr. 82-85 (Feb. 15, 2005). The jury awarded the plaintiff $86.4 million in punitive damages, more than 20 times the compensatory award.

20. *Flores* v. *Borg-Warner Corp.*, No. 98-4954-G (Nueces County, Tex. 319th Dist. Ct. 2002), *aff'd*, 153 S.W.3d 209 (Tex. App. 2004), *pet. for rev. granted*, No. 05-0189 (Tex. Apr. 21, 2006).

The plaintiff sued Borg-Warner for damages arising from his use of brake pads that contained asbestos. His counsel urged the jury to "send a message that the people of Corpus Christi, Texas are not gonna put up with this kind of behavior from Borg-Warner or from any other corporation." Tr. 21. The jury awarded $50,000 in punitive damages.

21. *Lovett* v. *Wyeth*, No. 97-665 (Van Zandt County, Tex. 294th Dist. Ct. 1999).

In the first fen-phen case tried to a jury, plaintiff's counsel told the jury: "You have unbelievable power. A jury has the most power of any non-elected government entity, because you have the power to tell this company that they did wrong and that they should pay for it. You have the power to try to get their attention. * * * So when you get back there and you deliberate on this case, keep that in mind, that you have the power in this first fen-phen case in the history of our country, you have the power to tell them you had better do it right the next time." Tr. 109-111. The jury awarded the plaintiff $20 million in punitive damages.

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No. 05-1256

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AMERICAN INSURANCE ASSOCIATION, AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

J. STEPHEN ZIELEZIENSKI
DAVID F. SNYDER
ALLAN J. STEIN
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Avenue NW
Washington, DC 20036
(202) 828-7171

MARSHA HARRISON
NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

SHEILA L. BIRNBAUM
Counsel of Record
BARBARA WRUBEL
DOUGLAS W. DUNHAM
ELLEN P. QUACKENBOS
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

ROBERT J. HURNS
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 River Road
Des Plaines, IL 60018
(847) 297-7800

Attorneys for Amici Curiae

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INTEREST OF THE AMICI[1]

Amici curiae National Association of Mutual Insurance Companies ("NAMIC"), American Insurance Association ("AIA"), and Property Casualty Insurers Association of America ("PCI") are three of the largest national trade associations of property and casualty insurers in the United States.

NAMIC is a full-service national insurance trade association with more than 1,400 member companies that underwrite 43 percent ($196 billion) of the property/casualty insurance premiums in the United States. NAMIC members account for 44 percent of the homeowners market, 38 percent of the automobile market, 39 percent of the workers' compensation market, and 31 percent of the commercial property and liability market. NAMIC benefits member companies through advocacy, public policy and member services.

AIA is one of the leading property-casualty insurance trade organizations, representing approximately 400 insurers that write more than $120 billion in premiums each year. AIA member companies offer all types of property-casualty insurance, including personal and commercial auto insurance, commercial property and liability coverage for small business, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance. AIA represents its members in every state and at the federal level in legislative, regulatory, and judicial forums.

PCI is one of the nation's premier insurer trade associations, representing over 1,000 companies that write 40.7 percent of the nation's automobile, homeowners,

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[1] Pursuant to *Supreme* Court Rule 37.6, amici curiae state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than amici curiae and their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have given blanket consent to the filing of all amicus briefs in this case, in letters of consent filed with the Clerk of this Court.

business, and workers compensation insurance. PCI serves as an advocate for the property/casualty insurance industry before state and federal policymakers; state and federal courts; key insurance industry, governmental, and business groups; the news media; and the public.

In this case, this Court has granted certiorari on two separate but related issues, namely whether due process permits a jury to impose punitive damages to punish the defendant for the effects of its conduct on nonparties, and whether the constitutional requirement that punitive damages be reasonably related to the harm to the plaintiff can be disregarded in cases where the court concludes there is extraordinary reprehensibility. Amici submit this brief to address the serious constitutional concerns raised by the first of these issues, the punishment of a defendant's conduct directed at nonparties.

Amici and their member companies have a substantial interest in this issue. Insurance companies (as members of a heavily regulated industry) often have similar or identically worded contracts with numerous consumers and often establish consistent policies and procedures for dealing with claims handling and other matters. Accordingly, the Oregon Supreme Court's ruling that a plaintiff may exact punishment not only for a defendant's conduct toward the plaintiff, but also for the defendant's similar conduct toward others, poses a grave concern to Amici and their member companies. This ruling lacks fundamental fairness both procedurally and substantively and, unless reversed by this Court, will establish a precedent that allows for the imposition of duplicative and grossly disproportionate punitive damage awards against insurance companies and other businesses.

SUMMARY OF ARGUMENT

In its decision below, the Oregon Supreme Court held that a civil jury should be permitted to punish a defendant not only for conduct that was directed towards the plaintiff, but also for conduct that was directed toward or affected nonparties. Amici respectfully submit that this holding squarely conflicts with this Court's decisions in *State Farm*

Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). This holding, if allowed to stand, would have a severe negative impact on insurance companies and consumers across the country.

While the Oregon Supreme Court's decision would affect businesses and defendants of all types, it raises issues of particular importance to the insurance industry. In the interests of fairness and efficiency, insurance companies commonly adopt standard policies and practices with regard to sales and claims handling so as to treat their policyholders and consumers in a similar fashion. The rule adopted below would work a vast expansion of liability for punitive damages, allowing a single jury to award a single plaintiff massive punitive damages for conduct towards other policyholders, whose claims are not before the court and who may intend to bring their own lawsuits or who may in fact have no complaint about, or no legal basis to question, the practice at issue. Not only would punitive damages awards based upon the Oregon Supreme Court's holding likely be enormous and unpredictable, but they would be duplicative as well. If each policyholder in a given state were empowered to collect punitive damages on the basis of theoretical harm to other policyholders in the state, then insurance companies could be forced to pay multiple punitive damages for the same alleged harms, contrary to fundamental principles of due process.

The Oregon Supreme Court's decision would also improperly transform civil juries into de facto state insurance regulators. The decision would expand the jury's role beyond that of fact finder with respect to a particular transaction between two parties, to that of an arbiter of unasserted and unproven hypothetical grievances of nonparties against insurance companies. This approach would in essence allow juries to regulate the conduct of insurance companies on a state-wide basis. Not only do lay juries lack the institutional competence and resources required for such broad regulatory judgments, but the States already have in place their own regulatory bodies dedicated to that policymaking role. Moreover, while States have been given broad authority to regulate the business of insurance,

they may not entrust that authority to juries in such a manner and to such an extent as to permit grossly excessive punitive awards that do not serve any legitimate state interest and that would improperly burden the business of insurance in violation of due process and the Commerce Clause.

For these reasons, and those set forth below, Amici respectfully submit that this Court should reverse the decision of the Oregon Supreme Court and clarify that, as a matter of due process, punitive damages may not be imposed to punish a defendant for conduct directed at nonparties.

ARGUMENT

I. THE RULE OF LAW ADOPTED BY THE OREGON SUPREME COURT, IF PERMITTED TO STAND, WOULD RESULT IN A VAST AND UNCONSTITUTIONAL EXPANSION OF PUNITIVE DAMAGES LIABILITY

A. The Oregon Supreme Court's Decision Directly Conflicts with this Court's Decisions in *Campbell* and *Gore*

In its decision below, the Oregon Supreme Court rejected Petitioner Philip Morris's argument that "*Campbell* prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties." *See* Petitioner's Appendix at 18a ("Pet. App. __"). The court so held despite the lack of any evidence at trial as to the individual circumstances of the thousands of unidentified individuals who the Oregon Supreme Court was willing to assume acted in reliance upon allegedly fraudulent statements in the defendant's advertising campaigns. *See id.* at 8a n.1.

In holding that *Campbell* does not prohibit punishment of a defendant's conduct towards nonparties, the Oregon Supreme Court approved the trial court's rejection of the jury

instruction proposed by Philip Morris that would have told the jury that punitive damages "should bear a reasonable relationship to the harm caused to" the plaintiff and that, although the jury could "consider the extent of harm suffered by others in determining what that reasonable relationship" was, the jury should not "punish the defendant for the impact of its alleged misconduct on other persons." *Id.* at 17a. The Oregon Supreme Court refused to accept the notion that harm to nonparties, while it may be relevant to evaluating the reprehensibility of a defendant's conduct under the first *Gore* guidepost, may not be directly punished through punitive damages. *See id.* at 18a n.3. The court stated: "It is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.*

The Oregon Supreme Court's decision, if followed in a lawsuit against an insurance company, would allow a civil jury, hearing a single case involving a single insured, to award damages punishing conduct of a defendant insurance company towards all other policyholders and/or consumers state-wide – persons not before the court and who have not been shown to have sustained any injury whatsoever. Given that insurance companies often have large numbers of policyholders in a state, the potential liability could be crushing – even where, and regardless of whether, the actual plaintiff sustained only minimal damages himself. It was precisely this need to prevent such disproportionate liability that was a fundamental consideration in this Court's decisions in *Campbell* and *Gore*.

In *Campbell*, this Court instructed that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm *to the plaintiff* and to the general damages recovered." *Campbell*, 538 U.S. at 426 (emphasis added). The Court's opinion in *Campbell* repeatedly makes clear that the harm *to the plaintiff* and the facts and circumstances of the defendant's conduct *to the plaintiff* must be the basis for the jury's award of punitive damages. *See, e.g., id.* at 425 ("The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm *to the*

plaintiff.") (emphasis added). Accordingly, in *Campbell*, this Court specifically rejected the Utah Supreme Court's reasoning that the $145 million punitive award passed constitutional muster because, although the harm to the plaintiffs could be "'appropriately characterized as minimal,'" the harm was "'massive in the aggregate.'" *Id.* at 423 (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1149 (Utah 2001), *rev'd*, 538 U.S. 408 (2003)). Thus, although this Court's decision in *Campbell* was (given the facts of that case) concerned with the constitutional impropriety of punishing a defendant's dissimilar conduct toward nonparties, the principles articulated in *Campbell* that require that the constitutional punitive damages analysis be focused on the defendant's conduct toward the plaintiff and the harm caused to the plaintiff do not leave room for the punishment of conduct toward nonparties, regardless of whether the conduct is similar or dissimilar. The attempt by plaintiff in the case at bar to escape the constitutional limits on punitive damages awards by transforming the trial of her own claims into a trial designed to seek punishment for the defendant's similar course of conduct toward thousands of other persons does not pass constitutional muster under *Campbell*.

Indeed, even before *Campbell*, this Court emphasized that punitive damages must bear a reasonable relationship *to the plaintiff's* harm, not to harms allegedly suffered by non-parties not before the court. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) (the Court's precedents require courts to evaluate "the relationship between the penalty and the harm *to the victim* caused by the defendant's actions") (emphasis added); *id.* at 440 (*Gore* requires examination of "the disparity between the harm (or potential harm) suffered *by the plaintiff* and the punitive damages award") (emphasis added); *see also Gore*, 517 U.S. at 580 (discussing "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages"); *id.* at 575 (condemning "the disparity between the harm or potential harm suffered *by Dr. Gore* and his punitive damages award") (emphasis added); *id.* at 581 (observing that in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), the Court "relied on the difference between [the punitive damages] figure and the

harm *to the victim* that would have ensued if the tortious plan had succeeded") (emphasis added).

In *Campbell*, this Court identified two related concerns in particular that require that a punitive award bear a reasonable relationship to the harm to the plaintiff. First, the Court emphasized that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . ." *Campbell*, 538 U.S. at 423. Second, the Court noted "the possibility of multiple punitive damages awards for the same conduct" created by punishment on the basis of conduct toward nonparties, as "in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Id.*

The Oregon Supreme Court gave an improperly narrow reading to this Court's words, confining the application of this Court's admonition that the courts should not "adjudicate the merits of hypothetical claims against a defendant under the guise of the reprehensibility analysis" to "hypothetical claims" based upon *dissimilar* conduct. Pet. App. 19a ("We think that Philip Morris takes the foregoing quoted material from *Campbell* out of context. The quote referred only to *dissimilar* acts and dissimilar claims.") (emphasis in original). That narrow reading is not supported by this Court's decision in *Campbell* and is adverse to the constitutional concerns underpinning this Court's due process punitive damages jurisprudence.

Contrary to the Oregon Supreme Court's decision, the fundamental due process concerns raised by a court's attempting to adjudicate the merits of the hypothetical claims of nonparties are present whether those hypothetical claims are based upon dissimilar conduct or similar conduct. Those concerns are both procedural and substantive and include the impossibility of a defendant's having a fair and adequate opportunity to defend against the hypothetical claims of nonparties by exploring in discovery and at trial the individual facts and circumstances relevant to the purported claims of such persons, as well as the fundamental unfairness of basing a punitive award on what must amount to speculation and conjecture – as the Oregon courts and jury

did in this case.

The Oregon Supreme Court's ruling that it is permissible to impose punitive damages to punish a defendant for its conduct to nonparties is incompatible with the fundamental constitutional requirement of proportionality. As this Court stated in *Gore*, "[t]he principle that punishment should fit the crime 'is deeply rooted and frequently repeated in common-law jurisprudence.'" 517 U.S. at 575 n.24 (citation omitted). In the context of punitive damages in civil cases, this Court's jurisprudence makes clear that this principle requires that a punitive damages award be proportional to the specific harm caused to the plaintiff in the case by the defendant's conduct. *See Campbell*, 538 U.S. at 426. Proportionality in civil cases is protected and furthered by the ratio guidepost. *See id.* at 425-26.

Significantly, as the Oregon Supreme Court conceded, punishment of conduct directed toward nonparties can only occur if the ratio guidepost is disregarded. *See* Pet. App. 31a (acknowledging that "the ratio guidepost considers only harm to the plaintiff" and "is not met"). Moreover, the lack of proportionality approved by the Oregon Supreme Court in the case at bar is twofold. As the court concedes, there is no proportionality between the plaintiff's harm and the punitive award. There was also no possible check on proportionality between the purported harm to the thousands of unidentified Oregonians that the jury was encouraged to punish and the amount of punitive damages that the jury concluded was appropriate to punish that putative harm. No entitlement to compensatory damages was established by or on behalf of such persons, and the extent of the purported harm to them was not (and could not be) determined.[2] Thus, the Oregon

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[2] For this reason, courts in class action litigation have disallowed plaintiffs' attempts to have a jury award punitive damages for the class before issues of liability and compensatory damages are decided, as violative of the proportionality requirement. *See, e.g., In re Baycol Prods. Litig.*, 218 F.R.D. 197, 215-16 (D. Minn. 2003) (disapproving class trial plan that called for a class-wide trial on punitive damages followed by individual class members' trials for compensatory damages). *See also In re Simon II Litigation*, 407 F.3d 125, 138-39 (2d Cir. 2005) ("In certifying a class that seeks an assessment of punitive damages prior

jury was permitted unlimited, directionless discretion in fixing the amount of the punitive award.

The Oregon Supreme Court professed confusion as to how it is possible to take harm to others into account in gauging reprehensibility without directly punishing for it. Pet. App. 18a n.3. But that may be a reason for declining to allow this kind of collateral evidence to infect the jury at all, not for allowing the jury to punish the defendant for it as if the case were a class action.[3]

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to an actual determination and award of compensatory damages, the district court's Certification Order would fail to ensure that a jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class, and that will be reasonable and proportionate to those harms"; under *Campbell*, a punitive damages award in a class action may not "include punitive damages due to outrageous conduct by defendants towards non-class members").

[3] It merits mention that, although the Court has at times suggested that prior conduct directed at nonparties may be relevant to determining the reprehensibility of the conduct directed at the plaintiff, the Court has made clear that "courts must ensure the conduct in question replicates the prior transactions." *Campbell*, 538 U.S. at 423. As the Eighth Circuit explained, "[i]n determining what conduct constitutes a previous example of the same conduct . . . we must be careful not to let the exception swallow the rule. By defining his or her harm at a sufficiently high level of abstraction, a plaintiff can make virtually any prior bad acts of the defendant into evidence of recidivism." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). To avoid that, "the relevant behavior must be defined at a low level of generality." *Id.* This is particularly true when the defendant is a large business or corporation. It is the nature of the insurance business and of many other consumer-oriented businesses to engage in repeated similar transactions with consumers. As with the practice at issue in *Gore* (not informing consumers that minor cosmetic damage on a car was repaired before sale), a practice may appear "reprehensible" to a plaintiff and his lawyer but may have been reasonably believed by the defendant to be lawful and appropriate. *See Gore*, 517 U.S. at 578 (noting that BMW's "decision to follow a disclosure policy that coincided with the strictest extant state statute" was not sufficiently reprehensible to justify the punitive award in that case). Likewise, the plaintiffs in *Campbell* presented to the jury as "reprehensible" many different insurance practices that were in fact

In any event, the distinction that the Oregon Supreme Court found so elusive is one that has been drawn by both this Court and other state supreme courts. In *Gore*, for example, this Court held that, although the jury was entitled to consider that the conduct at issue affected approximately 1,000 other car purchasers nationwide in determining the degree of reprehensibility of that conduct, the jury could not punish directly for the harms to those purchasers. 517 U.S. at 568-74 & n.21.

More recently, the California Supreme Court explained in *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191 (2005) that,

> To consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense . . . . By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.

Id. at 1206 n.6.

This Court in *Campbell* reiterated that there can be no "bright-line" constitutional limits on the ratio between compensatory damages and punitive damages. *Campbell*, 538 U.S. at 424-25. Indeed, reprehensible conduct may vary from contemptible to extremely egregious, warranting punitive damages awards in different amounts. Depending upon where on the range of reprehensible conduct the defendant's conduct falls and upon the amount of compensatory damages, a constitutionally permissible ratio of punitive damages to compensatory damages may vary from a 1 to 1 (or even smaller) ratio to a 9 to 1 ratio. What

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lawful and even approved practices in the states where they occurred. *See Campbell*, 538 U.S. at 422. Thus, even the limited use of "repeated conduct" in the reprehensibility analysis requires restraint and wisdom on the part of juries and courts.

Campbell suggests is that a jury may consider harm to nonparties but (if at all) only for the purpose of ascertaining the level of reprehensibility of the defendant's conduct and only if the conduct being punished "replicates the prior transgressions." *Id.* at 423. At all times, however, a punitive damages award must bear a reasonable relationship to the harm caused to the plaintiff and to the general damages recovered. *See id.* at 426 ("courts *must* ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered") (emphasis added). If the defendant acted with extreme reprehensibility and compensatory damages are not "substantial," a punitive damages award at the high end of single digit ratios may be appropriate. Conversely, if the defendant's reprehensibility is not extreme or extraordinary, a ratio of 1 to 1 or less may be appropriate. But in no event, under *Campbell*, can a plaintiff in one case be awarded punitive damages for conduct directed at nonparties.

Amici respectfully submit that the Court should reaffirm the fundamental distinction between considering conduct directed at nonparties as bearing on reprehensibility, and directly punishing that conduct – which is plainly impermissible under this Court's decisions in *Campbell* and *Gore*. The preservation of this simple, yet fundamental, distinction is crucial to the insurance industry in this country – and to the continued availability of affordable insurance to millions of consumers nationwide.

B. The Oregon Supreme Court's Decision Would Subject Insurance Companies and Other Businesses to Duplicative and Grossly Disproportionate Punitive Damage Awards

The Oregon Supreme Court's decision not only is contrary to this Court's plain dictates in *Campbell* and *Gore*, but also raises the specter of unconstitutionally duplicative and disproportionate punitive damages awards. This danger is magnified in the context of the insurance industry, where heavy state regulation means that similar sales and claims handling policies and practices are typically followed with respect to transactions with consumers.

It is common and necessary practice by insurance companies to adopt broad standard procedures with respect to policyholders and insureds. In order to treat their consumers in a similar fashion, insurance companies typically implement standard polices and practices with regard to sales and claims handling. Under the rule adopted by the Oregon Supreme Court, the use of such standard practices could expose insurance companies to grave risks of duplicative and disproportionate liability for punitive damages for conduct directed to nonparties.

The rule of law adopted by the Oregon Supreme Court, if allowed to stand, would create precisely the risk of duplicative punitive damages awards that this Court cautioned against in *Campbell*. As this Court observed in *Campbell*, punishment on the basis of "other parties' hypothetical claims against a defendant" creates the possibility that punitive damages will be repeatedly collected by different plaintiffs for the same harm to the same persons. *Campbell*, 538 U.S. at 423 ("[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains") (citing *Gore*, 517 U.S. at 593 (Breyer, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or

punitive, damages that subsequent plaintiffs would also recover")).

This danger of duplicative punishment has been recognized by numerous courts and commentators. As one commentator has observed,

> [The] practice of punishing the defendant, in a single case brought by a single victim, for the full scope of societal harm caused by its entire course of wrongful conduct . . . has led countless judges and commentators to worry about the potential for excessive multiple punishment: the possibility that several victims will obtain punitive damages awards that were each designed to punish the entire wrongful scheme, resulting in unjustly high cumulative punishment.

Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 587 (2003) (herein cited as Colby, "*The Multiple Punishment Problem*"); *see also* Dennis N. Jones, *et al.*, *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 Ala. L. Rev. 1, 3-4 (1991).

Similarly, the Eighth Circuit in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004), aptly explained that:

> In [*Campbell*], the Supreme Court emphasized that courts cannot award punitive damages to plaintiffs for wrongful behavior that they did not themselves suffer. Tying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct: If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative

punitive damages award.

Id. at 797.

For insurance companies as for other closely regulated consumer-oriented businesses, the Oregon Supreme Court's disregard of this risk of duplicative punishment could have significant negative implications. Because most insurance company policies and practices are implemented on at least a state-wide basis, each consumer in a given state could bring a suit and individually collect damages on the basis of hypothetical harms caused to numerous other consumers in the state – all of whom would remain free to bring their own suits (or none of whom may feel they were harmed).

The unfairness and injustice of subjecting civil defendants to the threat of successive, duplicative liability is beyond dispute. *See* Colby, *The Multiple Punishment Problem*, 87 Minn. L. Rev. at 597. As one commentator has observed:

> In the criminal context, this unfairness is obviated by the law of double jeopardy. The Double Jeopardy Clause "serves the function of preventing both successive punishment and successive prosecution" . . . . In the civil law, where the Double Jeopardy Clause has no application to litigation between private parties, the fear of unfair multiple bites at the same apple generally finds expression in the doctrine of res judicata.

Id. (citation omitted). However, res judicata would not protect defendants against successive suits by different plaintiffs, seeking to collect punitive damages for the same "hypothetical claims" of the same nonparties. *See Campbell*, 538 U.S. at 423. Nor would it protect a defendant, if one of the nonparties, whose harm has already been punished by a large punitive award to another plaintiff, decided to press his own claims for compensatory and punitive damages.

In addition, there is a fundamental element of unfairness in allowing a defendant to be punished for harms to persons who have not established their entitlement to compensatory damages and without having an adequate opportunity to

defend itself. "When a defendant engages in a course of conduct that allegedly harms a large number of people, many of the alleged victims, if they bring their own lawsuits, will not prevail, or perhaps will be unable to convince the jury that the defendant's conduct was sufficiently malicious to warrant the imposition of punitive damages." Colby, *The Multiple Punishment Problem*, 87 Minn. L. Rev. at 596. Likewise, under the Oregon Supreme Court's decision, defendants would be effectively stripped of the opportunity to assert individual affirmative defenses (*e.g.*, statute of limitations) or argue that a specific individual could not prove the elements of his or her claim (*e.g.*, actual damages, reasonable reliance). *See id.* at 601. This approach is contrary to the fundamental due process right of defendants to have "an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

Not only would the Oregon Supreme Court's decision expose insurance companies to duplicative punitive damage awards, but each such award would also be grossly disproportionate to the harm suffered by the plaintiff in the case before the court. This Court has expressed its concern about punitive damages "run wild." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). And nowhere have the effects of this punitive damages explosion been felt more than in the insurance industry, whose members face a higher risk of excessive awards than any other industry. *See* Eric Moller, *at al.*, *Punitive Damages in Financial Industry Verdicts* 24 (RAND Institute for Civil Justice 1997) ("juries in insurance cases tend to reach higher punitive damage awards relative to the compensatory damages awarded than those hearing other types of cases").

The Oregon Supreme Court's decision will only exacerbate this crisis, at the expense not only of the insurance industry, but also of consumers and policyholders nationwide. The fact that insurance companies generally adopt standard sales and claims handling practices would likely make the industry a target for attorneys pressing questionable, small damages claims, in the hopes of scoring a punitive damages jackpot. The costs of defending such suits, not to mention the potentially massive liability of even a single disproportionate punitive damages award, would

inevitably affect the cost and availability of insurance coverage for millions of Americans.

Indeed, the Oregon Supreme Court's decision, if followed, could be used by plaintiffs' counsel to attempt to turn virtually any consumer suit against an insurance company into a "bet-the-company" proposition. Any such suit, no matter how small the compensatory damages involved and how minor the injury to the plaintiff, could potentially produce a large punitive award geared not to the plaintiff's harm, but to the number of policyholders state-wide presumed to have been affected by the defendant's conduct.

Accordingly, under the regime that would be created by the Oregon Supreme Court's decision, it is very likely that duplicative and grossly disproportionate punishments would be imposed upon insurance companies, in violation of this Court's admonition that punitive damages be both "reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426. Amici respectfully submit that this Court should provide the necessary guidance to prevent this unconstitutional result, which could be devastating both to insurance companies and to their consumers.

C. The Oregon Supreme Court's Decision Would Subject Insurance Companies and Other Businesses to Arbitrary and Unpredictable Punitive Damage Awards

As this Court stated in *Campbell*, "'elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'" *Campbell*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574).[4] Thus, in *Campbell*

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[4] *See also Gore*, 517 U.S. at 585 ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in

and *Gore*, this Court sought to bring predictability and rationality to the process by which punitive damages are awarded in this country. The decision below undermines that effort, subjecting insurance companies and other large corporate defendants to enormous, unpredictable, and arbitrary punitive awards.

This Court has observed that "'[p]unitive damages pose an acute danger of arbitrary deprivation of property.'" *Campbell*, 538 U.S. at 417 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). Whereas due process "prohibit[s] the imposition of grossly excessive or arbitrary punishments on a tortfeasor," *Campbell*, 538 U.S. at 416, the Oregon Supreme Court's decision virtually guarantees the imposition of such excessive and arbitrary punishments, by allowing punitive damages to be imposed for conduct directed not only toward the plaintiff but toward nonparties as well.

The Oregon Supreme Court's decision represents a radical departure from the protections inherent in the traditional litigation model and creates an unreasonable risk of arbitrary punitive awards. In traditional litigation, the "jury had only to assess the particular transaction before it and to determine on that basis whether the defendant's conduct warranted a punitive award." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 141 (1986). Thus, "[a]lthough not constrained by the same procedural requirements as other forms of punishment, punitive damages at least were based on a manageable jury inquiry" that served to anchor punitive damages to the underlying claims and injuries of the particular plaintiff at issue. *Id.*

In this case, the Oregon Supreme Court improperly approved a procedure that permitted the jury to impose punitive damages on Philip Morris not only for its conduct toward plaintiff's decedent but also for its conduct directed at thousands of other unidentified individuals across the State of Oregon. The precedent set by the Oregon Supreme Court,

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the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.")

if allowed to stand, would subvert the central due process requirements of fairness, proportionality and reasonableness and expose corporations and businesses to vast and unbounded punitive awards.

Even under the traditional litigation model, the consistency and rationality of juries' punitive damage awards has repeatedly been called into question. *See* Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade & W. Kip Viscusi, *Punitive Damages: How Juries Decide* (2002). Numerous studies have shown that, as a result of common cognitive biases, juries do not reach reliable, consistent conclusions as to the proper size of punitive damages awards. Thus, although jurors show remarkable consistency in ranking the "outrageousness" of wrongful conduct on a bounded scale (*e.g.*, a scale of one to ten), their translation of such rankings into dollar punitive awards is enormously variable and unpredictable. *See id.* at 29-32. This wide variability would be severely exacerbated if, as the Oregon Supreme Court would allow, juries are asked to consider and punish not simply the defendant's conduct toward the plaintiff, but also conduct directed toward nonparties whose purported claims are not before the court and cannot be adequately subjected to the fact-finding process.

Through its decisions in *Campbell* and *Gore*, this Court sought to bring a measure of predictability and restraint to, and reduce the arbitrariness of, punitive damages awards. The Court sought to achieve this result in part by tethering punitive damage awards to the conduct affecting and the actual harm sustained by the particular plaintiff. Amici respectfully submit that the approach taken by the Oregon Supreme Court erroneously sets aside "well-established constraints on punitive damages," *Campbell*, 538 U.S. at 427, and provides new occasion for arbitrary and unpredictable punitive awards.

II. THE RULE OF LAW ADOPTED BY THE OREGON SUPREME COURT WOULD IMPROPERLY TRANSFORM CIVIL JURIES INTO DE FACTO REGULATORS OF INSURANCE COMPANIES AND OTHER BUSINESSES

The Oregon Supreme Court's decision would improperly expand the role of civil juries from factfinders with regard to a particular plaintiff's claims to de facto state insurance regulators. Allowing a jury to serve as an arbiter of unasserted and unproven hypothetical grievances of nonparties against insurance companies increases the chances for arbitrary and unpredictable results and punishments. Lay juries lack the expertise, resources, experience and statutory authority required for such broad regulatory judgments. Moreover, entrusting juries with what are in essence wide-ranging legislative or regulatory determinations and permitting juries to assess state-wide practices and conduct raises the risk that defendants will face large punitive awards without fair notice either that the conduct in question was subject to punishment or of the severity of the potential penalty. *Cf. Campbell*, 538 U.S. at 417 (due process requires "'that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose'") (citation omitted).

Permitting juries to regulate through the imposition of punitive damages raises other constitutional concerns as well. Each state has been delegated authority to regulate the business of insurance within its boundaries. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 733 (1996) (Kennedy, J., concurring) ("States, as a matter of tradition and express federal consent, have an important interest in maintaining precise and detailed regulatory schemes for the insurance industry"). However, no state has a legitimate interest in delegating to its civil juries the power to regulate insurance company conduct through the imposition of arbitrary and excessive punitive damage awards. *See Campbell*, 538 U.S. at 417-18 (quoting *Pacific Mut. Life Ins.*

Co. v. Haslip, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)) ("'[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. . . . A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim.'").

As this Court has recognized, the business of insurance is interstate commerce. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 545-46 (1944). Insurance companies, like other large corporations, are "active participants in the national economy" and that status "implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." *Gore*, 517 U.S. at 585. A punitive damages award should not be "so large as to 'implicate[] th[at] federal interest.'" *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1338 (11th Cir. 1999) (quoting *Gore*, 517 U.S. at 585). A rule that permits juries to punish conduct that is not directed toward the plaintiff is likely to result in awards that "express biases against big businesses, particularly those without strong local presences," *Campbell*, 538 U.S. at 417 (citation omitted), even if that conduct is similar to the conduct that forms the basis of the plaintiff's claims and even if the conduct punished is limited to in-state conduct. The risk that juries will be improperly influenced to impose large awards on out-of-state corporations is even greater where (as in the case at bar) the defendant's net worth is a "focal point" of the plaintiff's punitive damages presentation. *See* Pet. at 27.

The Oregon Supreme Court has licensed Oregon juries to exact enormous punitive damages awards from large corporations, unfettered by traditional constraints of proportionality. Such awards impermissibly threaten the "maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce," *Gore*, 517 U.S. at 517-72 (citation omitted), in violation of due process and the Commerce Clause.

CONCLUSION

For the foregoing reasons, Amici respectfully submit that this Court should reverse the decision of the Oregon Supreme Court and clarify that, as a matter of due process, punitive damages may not be imposed on a defendant for conduct directed at nonparties.

Respectfully Submitted,

J. Stephen Zielezienski
David F. Snyder
Allan J. Stein
American Insurance Association
1130 Connecticut Avenue NW
Washington, DC 20036
(202) 828-7171

Sheila L. Birnbaum
(Counsel of Record)
Barbara Wrubel
Douglas W. Dunham
Ellen P. Quackenbos
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036
212-735-3000

Marsha Harrison
National Association of Mutual Insurance Companies
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

Robert J. Hurns
Property Casualty Insurers Association of America
2600 River Road
Des Plaines, IL 60018
(847) 297-7800

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No. 05-1256

IN THE
Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF OREGON FOREST INDUSTRIES COUNCIL, OREGON GROCERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/OREGON CHAPTER, OREGON RESTAURANT ASSOCIATION, ASSOCIATED OREGON INDUSTRIES, AND STRATEGIC ECONOMIC DEVELOPMENT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Thomas W. Brown
COSGRAVE VERGEER KESTER LLP
805 SW Broadway
8th Floor
Portland, OR 97205
(503) 323-9000

Counsel for Amicus Curiae

QUESTION PRESENTED

This *amicus* brief addresses generally the first question the Court accepted for review.

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BRIEF OF OREGON FOREST INDUSTRIES COUNCIL, OREGON GROCERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/OREGON CHAPTER, OREGON RESTAURANT ASSOCIATION, ASSOCIATED OREGON INDUSTRIES, AND STRATEGIC ECONOMIC DEVELOPMENT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

I. INTRODUCTION

A. Statement of Interest of *Amici Curiae*

The Oregon Forest Industries Council (OFIC) was founded in 1975 to represent and promote Oregon's forest products industry. OFIC is a nonprofit trade association whose 59 members own and manage approximately 5 million acres of private forestland and manufacture a wide array of forest products. Oregon's forest sector directly accounts for over 85,000 jobs statewide which generate $3.5 billion in wage income. As an advocate for the Oregon forest industry, OFIC represents its members before the Oregon legislature, the Oregon Board of Forestry, rule making agencies, and in courts of law on matters dealing with natural resource management, manufacturing, environmental issues, taxation, and other important concerns of Oregon's forest sector businesses.

Since 1980, the not-for-profit Oregon Grocers Association (OGA) has been working for the state's grocery trade as its legislative watchdog, public relations agency and news and information resource. The OGA serves as the spokesperson for Oregon's grocery industry by promoting the common interests and issues of its membership, and by providing current communications, leadership and member services. The OGA represents the retailers, wholesalers, brokers, manufacturers and

suppliers that support the state's $30 billion dollar grocery industry - one of Oregon's biggest assets.

The National Federation of Independent Business/Oregon Chapter (NFIB/Oregon) represents over 12,000 independently owned Oregon businesses. NFIB/Oregon's purpose is to impact Oregon public policy and be a key business resource for small and independent businesses.

The Oregon Restaurant Association (ORA) is the leading business association for the restaurant industry in Oregon. Comprised of more than 9,000 restaurant and foodservice outlets, the industry employs a work force of more than 110,000, and creates a total economic impact of $9.7 billion. The ORA represents and protects Oregon's restaurant and hospitality businesses and their suppliers at local, state, and national levels.

Associated Oregon Industries (AOI) originated in 1895 as an organization to promote Oregon products. Today, AOI is a nonprofit, statewide business and lobbying organization representing the interests of Oregon businesses. AOI represents over 20,000 businesses and individuals across the state, ranging from small start-up companies to the state=s largest employers. AOI members employ approximately 30 percent of the state=s workforce. As an advocate for business, AOI represents its members in the Oregon Legislature, in courts of law and before rule making agencies on matters dealing with education, the environment, health care, employment and labor law, natural resources, taxation, transportation, workplace safety and workers= compensation, and other issues important to Oregon business.

The Strategic Economic Development Corporation (SEDCOR) is the lead economic development agency for Marion and Polk Counties in Oregon. SEDCOR is a private, non-profit membership organization, composed of over 450 business and community leaders, whose mission is to enhance and diversify the

economy of the Mid-Willamette Valley by supporting and enhancing the performance of existing businesses and recruiting new businesses to Marion and Polk Counties. Over the past 10 years, SEDCOR has been pivotal in developing over $1 billion in new investment in the Mid-Willamette Valley, creating or maintaining over 5,000 basic sector jobs.

The OFIC, OGA, NFIB/Oregon, ORA, AOI and SEDCOR (collectively, the Oregon *amici)* have no monetary interest in the outcome of this case, and their members have no single viewpoint concerning the tobacco industry. The Oregon *amici* are concerned, however, that Oregon courts (and, particularly, the Oregon Supreme Court) fail to understand and follow this Court's existing punitive damages cases, thus opening the door for Oregon juries to impose massive punishment with no meaningful post-verdict review. The Oregon *amici* urge the Court to reject the precedent this case establishes (which, to a large degree, simply extends the precedent established in Oregon over the last 12 years) and its unfortunate detrimental effect on Oregon businesses.[1]

B. Summary of Argument

Before 1994, following the mandate of Oregon's Constitution,[2] Oregon appellate courts did not review a jury's decision on the amount of punitive damages.[3] In *Honda Motor Co.*

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[1] Pursuant to Rule 37.6, the Oregon *amici* state: (1) all parties have consented to this brief; (2) no counsel for any party has authored this brief; and (3) no party or entity, other than the Oregon *amici*, their members or their counsel, has made any monetary contribution to the preparation or submission of this brief.

[2] Article VII (Amended), section 3, of the Oregon Constitution provides:

> "[N]o fact tried by a jury shall be otherwise reexamined by any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

[3] *See Van Lom v. Schneiderman,* 187 Or. 89, 110-13, 210 P.2d 461, 469 (1949) (assessment of punitive damages, because it is a matter "committed to the

v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994), this Court explained that such review was required by the Due Process Clause of the Fourteenth Amendment. And, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), and *State Farm Mut. Ins. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), this Court sought to explain, both procedurally and substantively, how review for excessiveness should be conducted and when impermissibly excessive awards exist.[4] Most importantly, at least for this case, in *State Farm*, the Court held that, no matter how reprehensible the defendant=s conduct, federal due process requires that a punitive damages award bear a reasonable relationship to the harm suffered by the plaintiff and to compensatory damages awarded.

All that this Court has done in the last 12 years in its punitive damages jurisprudence has had little, if any, effect in Oregon, particularly on Oregon's high court. After *Oberg*, the Oregon Supreme Court adopted a standard of review for punitive damage awards that was simply a "rubber stamp" for whatever a jury decided. After *BMW*, the Oregon Court of Appeals began to follow this Court's instructions, admonitions and guidance concerning punitive damages review. But the Oregon Supreme Court intervened and, notwithstanding *BMW* and *State Farm*,

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decision of a jury," is a question of fact to which the prohibition in Article VII, section 3 [now Article VII (amended), section 3] applies). This Court adopted the opposite view of what a punitive damages award involves in *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), concluding there that the amount of a punitive damages award is not a "fact" that is "tried" by a jury. 532 U.S. at 431, 121 S.Ct. at 1685.

[4] A process that the Court began in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 2711, 125 L.Ed.2d 1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).

reasserted its standard of complete deference to jury awards. Indeed, since *Oberg*, the Oregon Supreme Court has not changed a single punitive damages award and Oregon's intermediate appellate court has continued to approve double-digit ratios, including the breathtaking one in this case of 97:1.

How Oregon's appellate courts review punitive damages awards has already concerned this Court. Indeed, it has granted certiorari, vacated, and remanded five Oregon punitive damages cases in the last 12 years, including this one once before in 2004. Now, the Court needs to both make clear to Oregon courts their proper function in reviewing punitive damages awards and express the review process and criteria, particularly the proportionality requirement, in ways that Oregon's appellate courts cannot misunderstand or ignore. Only then, will Oregon businesses be treated comparably (as they should be) to businesses elsewhere when a jury awards punitive damages.

II. ARGUMENT

A. Introduction

Several years ago, Oregon adopted a marketing slogan – "things look different here." For the most part, the slogan reflected the very positive ways that Oregon is a unique place to live, work and, as important to these *amici*, have a business. Since 1995, the "things look different here" slogan has unfortunately manifested itself in Oregon's approach to reviewing seven figure punitive damages awards – that review is markedly differently than in other places. More importantly, the difference makes the risks of doing business in the state, particularly for manufacturers or sellers of products, different from other states in a very negative way, a fact, perhaps, best represented by this case, but certainly not limited to this case alone.

B. After *Oberg* and Before *BMW*

In *Oberg v. Honda Motor Co.*, 320 Or. 544, 888 P.2d 8 (1995), *cert. den.* 517 U.S. 1219, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996) (*Oberg II*), on remand from this Court, the Oregon Supreme Court stated that this Court's relevant precedent meant that

> "post-verdict judicial review of a jury's award of punitive damages is as follows: Was the award of punitive damages within the range that a rational juror would be entitled to award in the light of the record as a whole? The range that a rational juror is entitled to award depends, in turn, on the statutory and common law factors that the jury is instructed and permitted to consider when awarding punitive damages for a given claim."

320 Or. at 549, 888 P.2d at 10. Based on that very deferential review standard, the court affirmed a punitive damages award ($5 million) that was 5.4 times the compensatory damages (and 528 times the plaintiff's economic damages).

The Oregon Court of Appeals, applying *Oberg II*'s rule of complete deference to jury awards, not surprisingly, thereafter, refused to disturb all punitive damages awards it was asked to review. See *Lakin v. Senco Products, Inc.*, 144 Or. App. 52, 75-77, 925 P.2d 107, 120-22 (1996), *aff'd.*, 329 Or. 64, 987 P.2d 463 (1999) (in nail-gun injury case, affirming $4 million punitive damages award, even though the plaintiffs had been awarded $6.2 million in compensatory damages, in product defect case); *Purcell v. Asbestos Corp., Ltd.*, 153 Or. App. 415, 433-34, 959 P.2d 89, 100 (1998), *rev. den.*, 329 Or. 438, 994 P.2d 126 (1999) (without any reference to *Oberg II* or this Court's then-existing precedents, affirming $3 million punitive damages award in a mesothelioma injury case with $1.8 million in compensatory damages); *Stranahan v. Fred Meyer, Inc.*, 153 Or. App. 442, 466-71, 958 P.2d

854, 869-72 (1998), *rev'd. on other grnds.*, 331 Or 38, 11 P.3d 331 (2000) (reinstating $2 million punitive damages award, 16 times compensatory damages, where an initiative petitioner was improperly detained and arrested while attempting to collect signatures for petition at a shopping center). The court's message to trial courts was clear: defer to the jury's punitive damages decisions.

C. After *BMW* and Before *Parrott*

After this Court decided *BMW*, the Oregon Court of Appeals appropriately recognized that the Oregon Supreme Court's rule of complete deference to a jury's award could not be reconciled with the searching appellate review mandated by this Court. In *Blume v. Fred Meyer, Inc.*, 155 Or. App. 102, 963 P.2d 700 (1998), the Court of Appeals said:

> "a reviewing court's determination of whether the punitive damage award is unconstitutionally excessive is not dependent on instructions to the jury or on the jury's considerations. Under *BMW*, although the reviewing court accepts the facts and inferences as the jury found them, evaluating whether a punitive damage award is excessive requires examination of, but not deference to, the jury's award."

155 Or. App. at 113, 963 P.2d 700 (footnote omitted). But, notwithstanding what it understood to be a more vigorous review requirement, the court still affirmed an 18:1 ratio (and a $450,000 punitive damages award) where an African-American woman was detained for about 10 minutes by employees of a grocery store, pursuant to a store policy allowing any customer to be stopped at random to check for receipts. *Id.* at 115-19, 963 P.2d at 707-10.

Later in 1998, in *Parrott v Carr Chevrolet*, 156 Or. App. 257, 965 P.2d 440 (1998), *rev'd.*, 331 Or. 537, 17 P.3d 473 (2001),

the Court of Appeals, for the very first time, refused to approve a jury's punitive damages award. Again, reaffirming that *Oberg II*'s highly deferential review role did not survive *BMW,* the court said:

> "Under *BMW*, the starting point for examination of a punitive damage award is identification of the state's interests that a punitive award is designed to serve. *BMW*, 517 U.S. at 559, 116 S.Ct. at 1591, 134 L.Ed. 2d at 822. Underlying the inquiry are elementary notions of fairness: that persons must receive fair notice of the conduct that will subject them to punishment and also of the severity of the penalty the state may impose. *Id.* 517 U.S. at 560, 116 S.Ct. at 1591, 134 L.Ed.2d at 826. The United States Supreme Court articulated three 'guideposts' to assist in evaluating whether the award exceeds constitutional limits: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered and the punitive damage award; and (3) the difference between the award and the civil or criminal penalties authorized or imposed in comparable cases. *Id.* Although those guideposts are not exclusive, other considerations must be grounded in clear legal principles or historical or community-based standards. *See id.* 517 U.S. at 596, 116 S.Ct. at 1609, 134 L.Ed.2d at 839 (Breyer, J., concurring)."

156 Or. App. at 275, 965 P.2d at 451. In explaining its decision, the court noted:

> [D]efendant did inflict economic injury "intentionally through acts of misconduct," *BMW*, 517 U.S. at 576, 116 S.Ct. at 1599, 134 L.Ed.2d at 827, and we conclude that the record shows that only a sizable award will serve the state's interest in deterring that misconduct in the future. Important to our conclusion is the legislature's decision

> specifically to provide for private enforcement of the [Unlawful Trade Practices Act (UTPA)] through punitive, as well as compensatory, damages. ORS 646.638 ("The court or the jury, as the case may be, may award punitive damages[.]"). As the trial court commented, defendant's conduct here, which was part of its pattern of business, 'blew' the UTPA 'out of the water.' The potential threat of harm reaches well beyond the economic damage suffered by plaintiff, and the record lacks any evidence that defendant has any intention of changing its way of doing business. *See BMW*, 517 U.S. at 579, 116 S.Ct. at 1601, 134 L.Ed.2d at 829 n. 31 ('Before the verdict in this case, BMW had changed its policy with respect to Alabama and two other States. Five days after the jury award, BMW altered its nationwide policy to one of full disclosure.'). Here, defendant either refused to acknowledge its practices or sought to justify them as acceptable 'hands-off' management policy. We conclude that the trial court erred in reducing the punitive award to $50,000 and that a punitive award of $300,000 is reasonably related to the harm that occurred and is likely to occur."

Id. at 280-81, 965 P.2d at 453-54. (footnotes omitted).

In 1999, the Court of Appeals continued applying *BMW* in a reasonably faithful way but, notwithstanding *Parrott*, the court upheld every punitive damages award it reviewed. *See Axen v. American Home Products Corp.*, 158 Or. App. 292, 974 P.2d 224, *adhered to on recons.*, 160 Or. App. 19, 981 P.2d 340, *rev. den.*, 329 Or. 357, 994 P.2d 124 (1999), *cert. den.*, 528 U.S. 1136, 120 S. Ct. 979, 145 L.Ed.2d 930 (2000) (in a prescription medicine adverse reaction case, affirming $20 million punitive damages award and 8:1 ratio); *Kraemer v. Harding*, 159 Or. App. 90, 976 P.2d 1160, *rev. den.*, 329 Or. 357 (1999) (in case for defamation, intentional infliction of severe emotional distress, and intentional

interference with contractual relations, affirming punitive damages award of $75,000 despite compensatory damages of $127,000); *MacCrone v. Edwards Center, Inc.*, 160 Or. App. 91, 980 P.2d 1156 (1999), *vac'd. and rem'd.*, 332 Or. 41, 22 P.3d 758, *adh'd. to on remand*, 176 Or. App. 355, 31 P.3d 513 (2001), *rev. den.*, 334 Or. 190 (2002) (affirming, in intentional infliction of severe emotional distress case, punitive award ($1.25 million) 4.5 times compensatory damages); *Cantua v. Craeger*, 169 Or. App. 81, 7 P.3d 693 (2000) (in sexually-related battery case, affirming 20:1 ratio). So, in reality, the meaningful, searching review that *BMW* required (and which the Oregon Court of Appeals seemed to understand in *Parrott*) became largely ignored.

D. *Parrott*

The Oregon Supreme Court stepped back into the punitive damages fray when it reviewed the Court of Appeals' decision in *Parrott*. 331 Or. 537, 17 P.3d 473 (2001). Not surprisingly, the Supreme Court chose the one case where the Court of Appeals had overturned a jury's punitive damages verdict in light of *BMW*. More importantly, the Oregon Supreme Court showed no regard to what the Court said in that case.

At the outset, the Supreme Court rejected the Court of Appeals' view that *BMW* made *Oberg II*'s rational juror standard inapplicable. 331 Or. at 554, 17 P.3d at 484 ("We conclude, therefore, that the rational juror standard is compatible with and does not differ practically from *BMW*'s gross excessiveness inquiry, and that *BMW* has not 'superseded' the rational juror standard that this court articulated in *Oberg [II]*."). Having reaffirmed *Oberg II*'s improperly deferential review standard, the court then identified five criteria for determining the range of punitive damages that a rational juror would be entitled to award: (1) the statutory and common-law facts that allow an award for the claim at issue; (2) the state interests that the award would serve; (3)

the degree of reprehensibility of the defendant's conduct; (4) the disparity between the award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for similar misconduct. *Id.* at 555, 17 P.3d at 484.[5] Applying those factors, the court reinstated a punitive damages award that was 87 times the jury's compensatory damages award, finding that such a ratio – again, in an economic loss case brought under the Oregon Unlawful Trade Practices Act – "does not raise [our] suspicious judicial eyebrow." 331 Or. at 562, 17 P.3d at 489.

E. Between *BMW* and *Campbell*

Predictably, given its retention of the "rational juror standard" adopted in *Oberg II*, *Parrott* effectively ended any meaningful post-verdict review of punitive damages awards by lower courts in Oregon. *See Bocci v. Key Pharmaceuticals, Inc.*, 158 Or. App. 521, 974 P.2d 758 (1999), *vac'd. and rem'd.*, 332 Or. 39, 22 P.3d 758, *on remand,* 178 Or. App. 42, 35 P.3d 1106 (2001)(in failure to warn of prescription drug side effects case, affirming punitive damages award of $22.5 million to the plaintiff that was 45 times compensatory damages award); *Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 27 P.3d 1092 (2001), *rev. den.*, 334 Or. 260, 47 P.3d 486 (2002) (in products case, where a fishbowl the plaintiff was carrying shattered injuringaintiff's hands and wrists, affirming a 10:1 ratio and $1 million in punitive damages); *Macrone*, 176 Or. App. 355, 356, 31 P.2d 513 (by *per curiam* opinion, adhering to prior decision affirming punitive damages award 4.5 times compensatory damages).

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[5] Although the court held that in Oregon there is no state law review of punitive damages awards, 331 Or. at 553, 17 P.3d at 483, it nevertheless engrafted factors of its own creation to the federal test identified by this Court. And it did so for the stated purpose of determining whether its own "rational juror" standard was satisfied. *Id.*

Finally, in the original appeal in this case, following *Parrott*, the Court of Appeals reinstated the jury's $79 million punitive damages award (that, again, was 97 times the compensatory damages award). *Williams v. Philip Morris Inc.*, 182 Or. App. 44, 48 P.3d 824, *on reconsid.* 183 Or. App. 192, 51 P.3d 670, *rev. den.*, 335 Or. 142, 61 P.3d 938 (2002), *cert. granted, vac'd.* and *rem'd.*, 540 U.S. 974, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003). In partially explaining that decision, the court said:

> In this case, defendant's actions were part of its business strategy for over 40 years and, in defendant's own assessment, significantly contributed to its profitability. It is thus appropriate to consider the effects of defendant's actions on persons other than Williams in determining the amount of punitive damages. As we have already discussed, defendant's actions, even more than those of the defendant in *Parrott*, were 'particularly egregious' and thus justify particularly strong judicial punishment. *See Lane County v. Wood*, 298 Or. 191, 203, 691 P.2d 473 (1984) (purpose of punitive damages is "not to compensate an injured party, but to give bad actors a legal spanking"). In light of the 87 to 1 ratio in *Parrott*, we see nothing in a ratio of 97 to 1 that raises our judicial eyebrows, given the egregious nature of defendant's conduct as implicitly determined by the jury."

182 Or. App. at 71, 48 P.3d at 841.

F. After *State Farm*

Since *State Farm*, Oregon cases have frequently been brought to – and caught -- this Court's attention. The Court granted certiorari, vacated, and remanded the "fishbowl case," *Waddill*. 538 U.S. 974, 123 S.Ct. 1781, 155 L.Ed.2d 662 (2003). On remand, the Court of Appeals, applying *State Farm*, concluded that $1 million in punitive damages was constitutionally excessive

and "[i]n light of the Supreme Court's focus on ratios in the usual case," 190 Or. App. at 183, 78 P.3d at 576, reduced the award to 4 times the compensatory damages award. *Id.* Like *Waddill,* the Court granted certiorari, vacated and remanded *Bocci.* 538 U.S. 974, 123 S. Ct. 1781, 155 L.Ed.2d 662 (2003). On remand, the Court of Appeals concluded that the jury's award was constitutionally excessive and, based upon the extremely reprehensible character of the defendant's conduct, found a 7:1 ratio appropriate. 189 Or. App at 361, 76 P.3d at 676.

The Court also granted certiorari, vacated, and remanded this case. 540 U.S. 801, 124 S. Ct. 56, 157 L.Ed.2d 12 (2003). But, as noted, notwithstanding *State Farm* – and its prior post-*State Farm* decisions -- the Court of Appeals again found nothing wrong with a 97:1 ratio. 193 Or. App. 527, 92 P.3d 126 (2004), *aff'd.*, 340 Or. 35, 127 P.3d 1165, *cert. granted*, 126 S. Ct. 2329 (2006).[6] In justifying its decision on remand, the court relied explicitly on

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[6] As the Court knows, neither did the Oregon Supreme Court, although that court did acknowledge that *State Farm* supplanted *Parrott* (which, implicitly, also means that it supplanted *Oberg II*). The court said:

> "In *Parrott,* this court identified five factors to be considered to determine whether a punitive damage award is grossly excessive:
>
> '[T]he range that a rational juror would be entitled to award depends on the following: (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue; (2) the state interests that a punitive damages award is designed to serve; (3) the degree of reprehensibility of the defendant's conduct; (4) the disparity between the punitive damages award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for comparable misconduct.'
>
> *Parrott* has been superseded somewhat by *State Farm,* but the last three *Parrott* factors are, of course, the *BMW* guideposts as they have been further elucidated by *State Farm.* We consider only those guideposts in the following analysis."

340 Or. at 54, 127 P.3d at 1177 (internal citations omitted).

the unproven assumption that the alleged fraud had seriously harmed at least 100 hypothetical Oregonians:

> "As the Court did in *TXO*, the jury in assessing the amount of punitive damages was entitled to draw reasonable inferences as to the number of smokers in Oregon who had been defrauded during the past decades and would be affected in the future by defendant's conduct, if that conduct were not deterred. Based on the evidence before it, and, particularly, the pervasiveness of defendant's advertising scheme in Oregon, it would have been reasonable for the jury to infer that at least 100 members of the Oregon public had been misled by defendant's advertising scheme over a 40-year period in the same way that Williams had been misled. Such a conservative calculation of compensatory damages based on William's actual damages and the potential magnitude of damage to the public thus would cause the ratio between compensatory and punitive damages, whatever it is, to fall within *State Farm's* 4-to-1 boundary."

193 Or. App. at 562, 92 P.3d at 145.[7] And, finally, in *Goddard v. Farmers Insurance Co.*, 202 Or. App. 79, 120 P.3d 1260 (2005), an

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[7] The Oregon Supreme Court, while rejecting the Court of Appeals' "harm to others" rationale as inconsistent with *State Farm*, 340 Or. at 61-62, 127 P.3d at 1180-81, justified its decision to affirm the Court of Appeals on another basis just as inconsistent with *State Farm*:

> "Of the three *Gore* guideposts, then, two support a very significant punitive damage award. One guidepost-the ratio-cuts the other way. In the end, we are left to use those competitive tools to assess whether the jury's punitive damage award was not "grossly excessive" and therefore should be reinstated. * * * Single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts-reprehensibility and comparable sanctions-can provide a basis for overriding the concern that may arise from a double-digit ratio.

insurance "bad faith" case, the Court of Appeals reduced the jury's $21 million punitive damages award to a 3:1 ratio.[8]

G. Summary

Oregon's cases since *Oberg* have a common theme – despite *BMW* and *State Farm,* punitive damages jury decisions are rarely disturbed (and have *never* been disturbed by the Oregon Supreme Court) and, when they are reduced, the results still don't reflect properly this Court's relevant punitive damages precedents. In Oregon, a 3:1 ratio of punitive damages to compensatory damages has seemingly become the "floor" for any case supporting punitive damages not, as the Court has signaled, particularly in *State Farm*, a 1:1 ratio (or even less or no punitive damages at all where substantial compensatory damages are awarded). And, more disturbingly, in the majority of cases, double-digit ratios and seven figure punitive damages awards set by Oregon juries are still

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> And this is by no means an ordinary case. Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware. It put a significant number of victims at profound risk for an extended period of time. The State of Oregon treats such conduct as grounds for a severe criminal sanction, but even that did not dissuade Philip Morris from pursuing its scheme."

340 Or. at 62-63, 127 P.3d at 1181.

[8] In *State Farm,* of course, this Court suggested that "in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), a punitive damages award at or near the amount of compensatory damages" – there, resulting in a 1:1 ratio – would be justified. 538 U.S. at 429, 123 S. Ct. at 1525. Other courts have reached the same conclusion in substantial compensatory damages cases. *See Boerner v. Brown & Williamson Tobacco Co.,* 394 F.3d 594, 603 (8th Cir.2005) (holding that "substantial compensatory damages award" of over $4 million entered against tobacco company, in favor of widower whose wife died from lung cancer required punitive damages to be reduced to a ratio of approximately 1:1); *Williams v. ConAgra Poultry Co.,* 378 F.3d 790, 799 (8th Cir.2004) (concluding that "large compensatory award" of $600,000 in racial harassment claim "is a lot of money" and reducing punitive damages to 1:1 ratio).

approved. So, in reality, what this Court has tried to do to limit large punitive damages awards over the last 20 years has been lost on the state's courts and, certainly, on the Oregon Supreme Court. It, for sure, is not listening. Indeed, for that court, no punitive damages award has ever raised a "suspicious judicial eyebrow." *See BMW*, 517 U.S. at 583, 116 S. Ct. 1589 (quoting *TXO*, 509 U.S. at 481, 113 S. Ct. 2711 (O'Connor, J., dissenting)) (using description).

The clear pattern of Oregon's post-*Oberg* decisions exposes businesses in the state to arbitrary and unreasonable punitive damages awards, particularly in product liability cases. Indeed, in cases substantially similar to this one, there already exist vastly different punitive damages review decisions depending on whether the same tobacco products are sold in Oregon or California. *See Boeken v. Philip Morris Inc.*, 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638 (2 Dist 2005), *cert. den.*, ___ U.S.___, 126 S.Ct. 1567, 164 L.Ed.2d 297 (2006) (reducing punitive damage award to 9:1 ratio); *Henley v. Philip Morris, Inc.*, 114 Cal.App.4th 1429, 9 Cal.Rptr.3d 29 (1 Dist. 2004), *rev. granted*, 12 Cal.Rptr.3d 591, 88 P.3d 497, *rev. dism'd.*, 18 Cal.Rptr.3d 873, 97 P.3d 814 (Cal. 2004) (reducing punitive damages ratio to 6:1); *but see Bullock v. Philip Morris USA, Inc.*, 138 Cal.App.4th 1029, 42 Cal.Rptr.3d 140 (2 Dist. 2006) (affirming 33:1 ratio; petition for review pending)

This case clearly highlights the problem with Oregon's post-*BMW* and *State Farm* punitive damages jurisprudence: the Oregon Supreme Court expressly held that when conduct, in that court's view, is particularly reprehensible, there is no limit to the size of a resulting punitive damages award, because the reprehensibility of the conduct can simply override the constitutional requirement that a punitive award be proportional to the harm caused to the plaintiff. As a result, any Oregon business that manufactures or sells a product—from consumables to

fishbowls -- that engages in what a jury could decide is "highly reprehensible conduct," risks excessive punitive damages jury awards without any recourse to constitutionally required meaningful appellate review. That, to say the least, is a great concern to the Oregon *amici*.

III. CONCLUSION

To the extent "things look different here" for punitive damages defendants, it's time for the Court to stop that by setting clear standards and clear limits on punitive damages awards that Oregon courts (particularly, its high court) cannot ignore or avoid. Nothing less will get Oregon businesses (and all other Oregon defendants) the meaningful appellate court review of punitive damages awards that this Court has mandated.

DATED this 28th day of July, 2006.

COSGRAVE VERGEER KESTER LLP

Thomas W. Brown
805 SW Broadway, 8th Floor
Portland, OR 97205

Of Attorneys for *Amici Curiae* Oregon Forest Industries Council, Oregon Grocers Association, National Federation of Independent Business/Oregon Chapter, Oregon Restaurant Association, Associated Oregon Industries, and Strategic Economic Development Corporation

CERTIFICATE OF SERVICE

I, Thomas W. Brown, counsel for Oregon *amici* and a member of the Bar of this Court, certify that on this 28th day of July, 2006, I caused three copies of the BRIEF OF OREGON FOREST INDUSTRIES COUNCIL, OREGON GROCERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/OREGON CHAPTER, OREGON RESTAURANT ASSOCIATION, ASSOCIATED OREGON INDUSTRIES, AND STRATEGIC ECONOMIC DEVELOPMENT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER to be served by first-class mail on the following counsel:

James S. Coon, OSB 77145
Raymond F. Thomas, OSB 79416
Swanson Thomas & Coon
820 SW Second Avenue, Suite 200
Portland, OR 97204

William A. Gaylord, OSB 73104
Gaylord Eyerman Bradley PC
1400 SW Montgomery Street
Portland, OR 97201

Hardy Myers, OSB 64077
Michael D. Reynolds, OSB 74269
Department of Justice
1162 Court Street NE
Salem, OR 97301

Charles S. Tauman, OSB 77371
PO Box 19631
Portland, OR 97280

Kathryn H. Clarke, OSB 79189
921 SW Washington, Suite 764
Portland, OR 97205

Maureen Leonard, OSB 82316
520 SW 6th Avenue
Portland, OR 97204

Robert S. Peck, *Pro Hac Vice*
Center for Constitutional Litigation P.C.
1050 31st Street NW
Washington, DC 20007

Kenneth S. Geller
Evan M. Tager
Nickolai G. Levin
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006

William F. Gary, OSB 77032
Sharon A. Rudnick, OSB 83083
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401

Andrew L. Frey
Counsel of record
Andrew H. Schapiro
Lauren R. Goldman
Daniel B. Kirschner
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019

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In the Supreme Court of the United States

PHILIP MORRIS USA, **Petitioner,**

v.

MAYOLA WILLIAMS, **Respondent.**

On Writ of Certiorari to the Oregon Supreme Court

Brief of the States of Oregon, California, Maryland, Minnesota, Mississippi, Missouri, Montana, New Mexico, Oklahoma, Utah and Wisconsin Amici Curiae in Support of Respondent

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
JANET A. METCALF
KAYE E. MCDONALD
Assistant Attorneys General
1162 Court Street
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for State of Oregon

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

The Oregon Supreme Court determined that:

> Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect – and for two or more decades absolutely knew – that the scheme was damaging the health of a very large group of Oregonians – the smoking public – and was killing a number of that group [including Jesse Williams]. Under such extreme and outrageous circumstances, we conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process.

Williams v. Philip Morris, 340 Or. 35, 63-64, 127 P.3d 1165 (2006) (bracketed material added). Philip Morris contends that the punitive damages award made and affirmed in state court in this case is constitutionally excessive. In this setting, the questions presented are:

1. Whether the Oregon courts deprived Philip Morris of due process "by permitting the jury to punish Philip Morris for harms to non-parties," as Philip Morris claims (Pet. Br. I), or whether the state courts instead properly considered the harm and risk of harm that Philip Morris visited on other Oregonians when assessing the extreme reprehensibility of its conduct.

2. Whether, in considering the claim that this punitive damages award is constitutionally excessive, the Oregon

Supreme Court "disregard[ed] the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm," as Philip Morris puts it (Pet. Br. I), or whether the court instead properly weighed in the balance the pertinent factors that this Court has identified, placing permissible emphasis on Philip Morris's fraudulent, decades-long, and extremely reprehensible conduct.

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INTEREST OF THE STATE *AMICI*

The undersigned Attorneys General submit this brief on behalf of their respective States and pursuant to Rule 37.4. Most States provide, either through case law, by legislation, or both, for the imposition of punitive damages in appropriate cases, and the States are the arbiters, in the first instance, of when punitive damages may be allowed and how they may be assessed. Punishment of wrongdoers and deterrence of repeated misconduct by the tortfeasor and others are the overarching purposes of punitive damages, and the States have a strong interest in furthering those purposes and in punishing and deterring particularly egregious conduct. In addition, some States, including Oregon, provide that a portion of punitive damages awards goes not to the plaintiff, but to the State to be used for public purposes.[1] The State *amici* seek to protect the public benefits that incidentally (or directly) flow from allowing punitive damages awards.

SUMMARY OF ARGUMENT

States have long allowed courts to award punitive damages. This Court has applied the Fourteenth Amendment's Due Process Clause to channel the process by which such damages are imposed. Under the same authority, the Court has reviewed and, rarely, has limited the amount of such damages.

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[1] The States, in addition to Oregon, include Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Missouri, and Utah. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 616-17 (1996) (Ginsburg, J., dissenting) (appendix).

Petitioner Philip Morris artificially underestimates the significance of punitive and multiple damages in relation to the States' interest in deterrence. Through punitive and multiple damages, States seek to deter future injurious conduct, including conduct placing their residents at risk of injury or death. Punitive damages awarded in private litigation serve the public interest in specifically deterring individual wrong-doers from repeating their injurious conduct and in generally deterring other would-be offenders from following or continuing in the path blazed by the punitive damages judgment debtor.

Without support from any precedent of this Court, petitioner seeks to shift the focus from the future *conduct* of persons and entities – including petitioner – to the future *assumed liability* of those accused in hypothetical lawsuits in which state law allows punitive or multiple damages. This Court repeatedly has reaffirmed the legitimacy of the States' interest in deterring future injurious conduct, and the punitive damages awarded in this case further that important state interest.

Petitioner compounds its error by misconstruing the decision of the Oregon Supreme Court in this case. Contrary to petitioner's repeated assertions, the Oregon Supreme Court simply did not allow the jury in this case to punish petitioner for harms to non-parties. Instead, in assessing the reprehensibility of petitioner's long course of fraudulent conduct, the court emphasized the risk that petitioner's conduct posed to all Oregonians and particularly to those who smoke petitioner's product. The Oregon Supreme Court used the harm suffered by Jesse Williams (death from lung cancer) as an exemplar of the

magnitude of the risk to Oregonians created by petitioner's sustained and deliberate fraud. The risk being severe – sickness and death – the state court properly judged petitioner's conduct to be extraordinarily reprehensible and therefore requiring greater punishment and deterrence.

Petitioner suggests that the due process guarantee forbids the States from allowing punitive damages awards of more than four times the amount of compensatory damages. In this case, petitioner proposes that punitive damages properly should not exceed compensatory damages. Petitioner even hints that the constitutional limit in this case approaches zero. Petitioner's suggested holding is inconsistent with this Court's opinions, and is pregnant with risk to state interests in using multiple and punitive damages to specifically and generally deter injurious conduct. The State *amici* submit this brief to rebut petitioner's attempt to hobble and diminish this important tool for social order.

ARGUMENT

I. Due process permits States to use punitive damages to punish past misconduct and to specifically and generally deter future injurious conduct.

A. Punishment and specific and general deterrence

Philip Morris's arguments as to why substantial deterrence is not required here assume that the only deterrence interest served by the punitive damages award in this case is the specific deterrence of Philip Morris. (Pet. Br. 39-40). That assumption is incorrect. As explained be-

low, punitive damages serve societal interests that extend well beyond the interests of the particular plaintiff by deterring other tortfeasors as well.

It has long been recognized that the primary goals of punitive damages awards are to punish the tortfeasor and to deter both the defendant and others from repeated misconduct. In cases where punitive damages are awarded, "'[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.'" *Lake Shore Ry. v. Prentice*, 147 U.S. (40 Davis) 101, 107 (1893), quoting *Wilkes v. Wood*, Lofft 1, 18, 19, 19 Howell's State Trials 1153, 1167 (other citations omitted). "The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized." *Lake Shore Ry.*, 147 U.S. at 107.

> Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct. *See* Restatement (Second) of Torts, § 908 (1979); W. Prosser, *Law of Torts* 9-10 (4th ed. 1971).

Newport v. Fact Concerts Inc., 453 U.S. 247, 266-67 (1987).[2] This Court also has said that punitive damages "'are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979), quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (footnote and additional citations omitted).

The idea behind individual deterrence "is that a sufficient sum should be exacted from the defendant to make repetition of the misconduct unlikely." Dan B. Dodds, 2 *The Law of Torts*, § 381, at 1063 (2001). *See also* John J. Kircher & Christine M. Wiseman, 1 *Punitive Damages, Law & Practice*, § 2:07, at 2-15 (2000) ("punitive damages should serve to 'send a message' to the person against whom they are imposed"). General deterrence is based on the theory that punitive damages "will deter

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[2] The Restatement provides that "[p]unitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." *Restatement (Second) Torts* § 908(1) (1979). "[T]he purposes of exemplary damages are to punish for a past event and to prevent future offenses[.]" *Id.* at § 908(2). The latest edition of Prosser states that punitive damages "are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example." W. Page Keeton (ed), *Prosser and Keeton on the Law of Torts*, ch. 1, § 2, at 9 (5th ed. 1984).

persons other than the actual wrongdoer from engaging in conduct similar to that which occasioned the imposition of the sanction against the wrongdoer." Kircher & Wiseman, 1 *Punitive Damages*, § 2:09, at 2-22 (footnote omitted).

Punitive damages also may serve to deter future misconduct by the defendant and others by giving plaintiffs an incentive to bring actions for damages in situations where criminal prosecution may be unlikely. That is, punitive damages have "the effect of bringing to punishment types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor." *Kink v. Combs*, 28 Wis. 2d 65, 80, 135 N.W.2d 789 (1965). Thus, "[p]unitive damages serve not only the aggrieved victim, but also society[.]" *Id. See* Charles T. McCormick, *Damages* §77, at 276 (1935) (an advantage of punitive damages is that they bring punishment to crimes that often are not prosecuted). As the California Supreme Court has explained:

> One recognized purpose of punitive damages is to make a civil action economically feasible. As one commentator has stated: "All serious misdeeds cannot possibly be punished by government prosecution * * *. [Limited] judicial and prosecutorial resources permit prosecution for only a fraction of the crimes and violations committed. For these reasons, individual members of society must play a significant role in instituting actions to impose sanctions for serious misconduct. Society's interest in

> bringing a wrongdoer to justice is especially strong where the wrongdoer's conduct exceeds all bounds of decency. The doctrine of punitive damages promotes this interest. By offering the potential for recovery in excess of actual damages, the doctrine encourages plaintiffs to bring such actions. This is particularly important where actual damages are minimal * * *. Punitive damages thus can be characterized as a reward for the plaintiff's valuable role as a 'private attorney general.' Even where compensatory damages are substantial, an award of punitive damages helps to finance deserving claims by defraying the expenses of the action, such as attorneys' fees, that generally are not recoverable in American courts." Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 649-50 (1980) (fns. omitted).

Dyna-Med, Inc. v. Fair Employment & Housing Comm., 43 Cal. 3d 1379, 1402-03, 241 Cal. Rptr. 67, 743 P.2d 1323 (1987) (bracketed material and ellipses in court's opinion)

B. Due Process allows a State to use punitive damages to deter recidivism and to discourage others from breaking the law by engaging in similar conduct within the State's boundaries.

The Due Process Clause of the Fourteenth Amendment does not bar a State from using punitive and multi-

ple damages to deter the defendant and others from committing egregious misconduct within the State's boundaries. On the contrary, as this Court has stated, "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. A., Inc. v. Gore*, 517 U.S. 559, 568 (1996), citing *Gertz*, 418 U.S. at 350; *Newport*, 453 U.S. at 266-67. A "major," and proper, "objective of punitive damages is to prevent future misconduct." *Newport*, 453 U.S. at 268. Furthermore, "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *BMW*, 517 U.S. at 568.

C. Many States, and the United States, have chosen to use punitive and multiple damages to deter recidivism and to discourage others from breaking the law by engaging in similar conduct.

Every State allows punitive damages at least in some circumstances when authorized by statute.[3] *See generally*

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[3] Michigan, Nebraska, New Hampshire, and Washington are often listed as exceptions. *See, e.g.*, Richard L. Blatt, Robert W. Hammesfahr & Lori S. Nugent, *Punitive Damages* § 7.2B, at 247-48 (2005) (table, citing those States as ones that do not allow punitive damages). Admittedly, in those and some other States the judiciary has looked unfavorably at punitive damages. *McGee v. A C and S, Inc.*, 933 So.2d 770, 783 (La. 2006) ("punitive damages * * * are not allowed under Louisiana law unless expressly provided for by statute"); *City of Lowell v. Massachusetts Bonding & Inc. Co.*, 313 Mass.

Morton F. Daller (editor), *Tort Law Desk Reference* (2006) (canvassing state tort law, including the availability of punitive damages in all 50 States); Linda L. Schleuter, 2 *Punitive Damages*, ch. 20, 147-513 (5th ed. 2005) (same). The United States also provides by statute for punitive damages in numerous instances. Schleuter, 2 *Punitive Damages* § 21.1, at 517 ("A number of federal statutes expressly provide or forbid the recovery of punitive damages") (footnote, giving many examples of such statutes, omitted). The States, and the United States, also provide for awards of multiple damages in certain situations. *See* Schleuter, 2 *Punitive Damages*, ch. 20 (survey-

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257, 47 N.E.2d 265, 272 (1943) ("In this Commonwealth exemplary damages are not allowed unless authorized by statute"); *Birkenshaw v. City of Detroit*, 110 Mich App 500, 313 N.W.2d 334, 339 (Mich. App. 1981) ("In Michigan, exemplary damages are recoverable as compensation to the plaintiff, not as punishment of the defendant * * *. Punitive damages, on the other hand, are not recoverable"); *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684, 688 (1960) ("It has been a fundamental rule of law in this state that punitive, vindictive, or exemplary damages will not be allowed"); *Stewart v. Bader*, ___ A.2d ___, 2006 WL 2404035, *10 (N.H. 2006) ("Punitive damages are not allowed in New Hampshire"); *Stanard v. Bolin*, 88 Wash.2d 614, 565 P.2d 94, 98 (1977) (holding that punitive damages "are not allowed in this state because they are not authorized by statute"). In each instance, however, some statutes have provided for punitive damages. *Punitive Damages*, § 7.32, at 392 & n. 7 (listing Michigan statutory provisions), § 7.37, at 425 & n. 5 (Nebraska statutory provisions), § 7.39, at 434 & n. 5 (New Hampshire); § 7.57B, at 538 & n. 5 (Washington).

ing state law). *See, e.g.*, 15 U.S.C. § 15(a) (multiple damages in antitrust cases); 12 U.S.C. § 1975 (multiple damages available under the Bank Holding Company Act); 18 U.S.C. § 1964(c) (civil RICO).

II. The judgment in this case is consistent with due process.

A. The Oregon Supreme Court properly considered petitioner's conduct in relation to non-parties.

In light of the dual purposes of punitive damages, the judgment in this case is consistent with due process. Using the term "punishment" as a synonym for "liability," Philip Morris casts the Oregon Supreme Court's opinion as assuming liability to non-parties. (*E.g.*, Pet. Br. 11, equating "punish[ment] for harms to" non-parties with liability to those non-parties). Philip Morris then contends that the Oregon Supreme Court violated due process by assuming that Philip Morris would be liable to non-parties. In reality, the state court examined Philip Morris's conduct for a different purpose. Instead of assuming liability to non-parties, the court examined the potential impact of Philip Morris's conduct on unidentified Oregonians who were not parties for the purpose of determining "'the most important indicium of a punitive damages award'"—the reprehensibility of defendant's conduct. *Williams v. Philip Morris Inc.*, 340 Or. 35, 47, 55-56, 127 P.3d 1165 (2006), quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), and *BMW of N. A., Inc. v. Gore*, 517 U.S. at 575. The Oregon Supreme Court observed that in *State Farm* this Court disapproved jury consideration of dissimilar acts

and dissimilar claims in the calculation of reprehensibility, yet acknowledged the relevance of evidence of similar conduct against other parties to the calculation. *Id.* at 52-53, quoting *State Farm*, 538 U.S. at 422-24.

Having determined that the jury "could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct," the Oregon court found that, construing all facts in favor of the prevailing party, Williams, there was "no dispute that Philip Morris's conduct was extraordinarily reprehensible":

> Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue. It deliberately did so to keep smokers smoking, knowing that it was putting the smokers' health and lives at risk, and it continued to do so for nearly half a century.
>
> Philip Morris's fraudulent scheme would have kept many Oregonians smoking past the point when they would otherwise have quit. Some of those smokers would eventually become ill; some would die. Philip Morris's deceit thus would, naturally and inevitably, lead to significant injury or death.
>
> Although it weighs less in our analysis, we also note that Philip Morris harmed a much broader class of Oregonians. Every smoker tricked by its scheme, even those

> who never got ill, kept buying cigarettes—taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies. And every one of those smokers *risked* serious illness or death for as long as they remained deceived.

Williams, 340 Or. at 55-56 (emphasis in original).

The Oregon Supreme Court then proceeded to analyze the remaining factors in *State Farm*. Although there were no comparable civil sanctions available with which to compare Philip Morris's conduct, a comparison of the company's actions to "a familiar crime" was "not speculative or remote." *Id.* at 59. According to the state court, "[v]iewing the facts in the light most favorable to plaintiff, Philip Morris's actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter" and today "would constitute at least second-degree manslaughter," an offense that when committed by an individual is punishable by up to 10 years in prison and a $250,000 fine. *Id.* at 59-60.

The court recognized that the second *State Farm* guidepost—the ratio between the punitive damage award and the compensatory damage award—did not favor plaintiff and that "[s]ingle-digit ratios may mark the boundary in ordinary cases[.]" *Id.* at 60, 63. But as the court explained, "this is by no means an ordinary case":

> Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware. It put a significant number of victims at profound risk for an

> extended period of time. The State of Oregon treats such conduct as grounds for a severe criminal sanction, but even that did not dissuade Philip Morris from pursuing its scheme.
>
> In summary, Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group.

Id. at 63. Given "such extreme and outrageous circumstances," the court determined, "the other two guideposts—reprehensibility and comparable sanctions"—provided a basis for "overriding the concern that may arise from a double-digit ratio." *Id.*

By focusing on the "extraordinary reprehensibility" of Philip Morris's conduct, the Oregon Supreme Court's due process analysis is consistent with the dual deterrence rationale of punitive damages. The state court's analysis also is consistent with this Court's declared respect for the States' authority to use punitive damages to deter serious unlawful conduct. As this Court explained in *BMW*:

> In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will

> allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. * * * *Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.* * * * For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve.

517 U.S. at 568 (emphasis added; citations omitted).

Similarly, this Court has stated that "a reviewing court engaged in determining whether an award of punitive damages is excessive 'should accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *BMW*, 517 U.S. at 583, quoting *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part). Where fair procedures are followed at trial, "a judgment that is a product of that process is entitled to a strong presumption of validity," if not an irrebuttable presumption, or virtually so. *TXO Prod. Corp. v. Alliance Res. Group*, 509 U.S. 443, 457 (1993). *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 40, 42 (1991) (Kennedy, J., con-

curring) (to the extent that jury decisions are unpredictable, respect for the jury's ability to express the sense of the community and "the usual protections given by the laws of the particular State must suffice until judges or legislatures authorized to do so initiate system-wide change"); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988) (refusing to "short-circuit" resolution of challenges to punitive damages awards by state's courts or legislature); *Browning-Ferris*, 492 U.S. at 278 (where state law provides basis of decision, state law determines the propriety of punitive damage awards and factors that juries may consider in determining their amounts).

In this case, the Oregon Supreme Court's decision that the jury's $79.5 million punitive damages award was not excessive should be accorded that respect. The relationship between the large award and the State's interests in deterring Philip Morris and other tobacco companies from conduct like that in which Philip Morris engaged could not be clearer. Philip Morris's conduct struck at the heart of the State's most basic obligation to its citizens, namely to protect their health and welfare. Philip Morris sought to undermine the State's ability to do so by placing not only plaintiff, but all smoking Oregonians, in physical danger of illness and death. Philip Morris knowingly spread false or misleading information to keep smokers smoking; engaged in trickery and deceit; continued that course of conduct over a period of decades; and put money into its pockets at the expense of Oregon smokers. The amount of money Philip Morris and other tobacco companies stood to gain from encouraging Oregon smokers to continue habits that the company knew to

be dangerous, Philip Morris's willingness to engage in deceit in order to keep citizens in the smoking "fold," and the length of time in which Philip Morris engaged in its misconduct, make it reasonable to infer that nothing but an extremely large punitive damages award will deter Philip Morris and other tobacco companies from repeating their misconduct in the future. Because the punitive damages award resulted from fair procedures, the state court's decision upholding the jury's award should be upheld.

B. Petitioner is wrong when it claims that a substantial punishment is not needed in this case to advance the interests of punishment and deterrence.

Implicitly recognizing the strong relationship between the State's need for deterrence and the amount of punitive damages that constitutionally may be awarded, Philip Morris argues that "a substantial punishment is not needed to advance the interests of punishment and deterrence." (Pet. Br. 39). In that regard, Philip Morris points out that "[t]he promotional activities of tobacco companies have been closely monitored and regulated for years by Congress and the Federal Trade Commission." (Pet. Br 39). Moreover, the company notes, "Philip Morris has entered into settlements with all 50 States, including a Master Settlement Agreement ('MSA') with 46 States, including Oregon." (Pet. Br. 40). According to Philip Morris, "[t]he combination of federal and state oversight and the terms of the MSA will preclude any repetition of the conduct at issue here." (Pet. Br. 40).

That argument misses the mark in several respects. First, the existence of federal regulation supports, rather than undermines, the importance of substantial punishment in this case. It is, of course, true that "Congress has created a distinct regulatory scheme to address the problem of tobacco and health * * *." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000). The problem for Philip Morris is that *despite* that extensive regulation, it continued the course of conduct that led to Williams' death. This Court has set forth the history of federal regulation of the tobacco industry in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). The Court explained that "[i]n 1964, the groundbreaking Report of the Surgeon General's Advisory Committee on Smoking and Health concluded that '[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.'" *Id.* at 542, quoting Department of Health, Education and Welfare, U.S. Surgeon General's Advisory Committee, Smoking and Health 33.

> In 1965, Congress enacted the [Federal Cigarette Labeling and Advertising Act (FCLAA)] as a proactive measure in the face of impending regulation by federal agencies and the States. Pub L.89-92, 79 Stat 282. * * * The purpose of the FCLAA was twofold: to inform the public adequately about the hazards of cigarette smoking, and to protect the national economy from interference due to diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to

> the relationship between smoking and health. Pub L 89-92, § 2.

Id. at 541-42 (citation omitted).

The 1965 version of the FCLAA prescribed a label for cigarette packages: "Caution: Cigarette Smoking May Be Hazardous to Your Health"; required the Secretary of Health, Education and Welfare (HEW) to report to Congress about the health consequences of smoking and the advertising and promotion of cigarettes; and contained a pre-emption provision prohibiting any requirement of additional cautionary statements on cigarette packaging. *Id.* at 543. Between 1965 and 1969, the HEW Secretary recommended certain amendments to the FCLAA, and "House and Senate committees held hearings about the health effects of cigarette smoking and advertising by the cigarette industry." *Id.* at 543-44. "The final result was the Public Health Cigarette Act of 1969," in which Congress made several changes to the FCLAA. *Id.* at 544. The amendments strengthened the warning required on cigarette packages to: "Warning. The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health"; prohibited advertising of cigarettes on media that was subject to the FCC; and included a pre-emption requirement proscribing state laws based on smoking and health with respect to advertising or promoting cigarettes. *Id.*

Finally, "[i]n 1984, Congress again amended the FCLAA in the Comprehensive Smoking Education Act. Pub L 98-474, 98 Stat 2200." *Id.* at 545. "The purpose of the Act was to 'provide a new strategy for making Americans more aware of any adverse health effects of

smoking, to assure the timely and widespread dissemination of research findings and to enable individuals to make informed decisions about smoking.'" *Id.* "The Act established a series of warnings to appear on a rotating basis on cigarette packages and in cigarette advertising, § 4, and directed the Health and Human Services Secretary to create and implement an educational program about the health effects of cigarette smoking, § 3." *Id.* In the years following that amendment to the FCLAA, "[t]he FTC has continued to report on trade practices in the cigarette industry," including noting that in 1999, the first year since the master settlement agreement, the cigarette industry made the largest expenditure ever on advertising and promotions. *Id.*

In short, as Philip Morris contends, regulation of advertising by the cigarette industry has been in effect continuously since 1965. But Williams did not die until 1997. *Williams*, 340 Or. at 38. In the meantime, Philip Morris was part of two "organizations [that] developed and promoted an extensive campaign to counter the effects of negative scientific information on cigarette sales." *Williams*, 340 Or. at 40-41. In 1964, the year of the Surgeon General's report on the health hazards of smoking, the industry created the Council on Tobacco Research, which "designed its research program to avoid studying the biological effects of tobacco use, the very question that, according to the industry's statements, required more research." *Id.* at 40. According to Philip Morris's director of research in the late 1970's and 1980's, "his job was to attack outside research that was inconsistent with the industry's position by casting doubt on it." *Id.* at 40-41. "At least by the 1970's, there was ab-

solutely no scientific basis for denying the connection between cigarette smoking and cancer and other diseases. However, [Philip Morris] continued to assert that the hazard of cigarette smoking to health was uncertain when it actually knew that there was no legitimate controversy about that subject." *Id.* at 41. "Even after the early 1990's, when the industry finally had to admit that tobacco could be a risk factor associated with a number of diseases, it argued that there was a long chain of intervening events before a disease actually arose from cigarette smoking" and "continued to deny that cigarette smoking was addictive." *Id.* at 42. Williams continued to rely on Philip Morris's deceitful advertising practices, and he died partially as a result of them. *Id.* at 42.

In light of that history, Philip Morris's present contention that it was sufficiently deterred by federal regulations does not withstand scrutiny. The purpose of the 1984 amendments to the FCLAA was to "assure the timely and widespread dissemination of research findings and to enable individuals to make informed decisions about smoking." *Lorillard Tobacco Co.*, 533 U.S. at 545. Philip Morris did everything in its power to defeat those purposes. This case demonstrates the inadequacy of federal regulations to deter Philip Morris from its assault on Oregon citizens' ability to evaluate the true health risks of smoking. The State's interest in deterring Philip Morris from repeating such conduct is manifest and appropriate.

Philip Morris's argument also assumes that the only interest served by the award is the specific deterrence of Philip Morris. But general deterrence is also a legitimate

and important goal of punitive damages, and Philip Morris's argument is silent with respect to that state interest. Because the value of punitive damages in deterring other would-be tortfeasors is also part of the constitutional calculus, the facts that Philip Morris is highly regulated and has entered into the MSA are not conclusive in determining whether the award is excessive.

Finally, Philip Morris cannot credibly invoke the monetary elements of the MSA to claim that substantial punitive damages are not necessary to deter it from engaging in further instances of the misconduct that occurred here. Evidently, Philip Morris assumes that the monetary payments required by the MSA are directed toward deterring it from future misconduct. That assumption is unwarranted given the plain language of the MSA, which states, in relevant part:

> (d) Payments in Settlement. All payments to be made by the Participating Manufacturers pursuant to this Agreement are in settlement of all of the Settling States' antitrust, consumer protection, common law negligence, statutory, common law and equitable claims for monetary, restitutionary, equitable and injunctive relief alleged by the Settling States with respect to the year of payment or earlier years, except that *no part of any payment under this Agreement is made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced*

> *damages* or is the cost of a tangible or intangible asset or other future benefit.

MSA § XVIII (d) (emphasis added).[4] That language is inconsistent with the view that MSA payments are in part a substitute for punitive damages. Accordingly, they should not be viewed as a substitute for the deterrence that punitive damages provide.

It also bears noting that, under Or. Rev. Stat. § 31.735, 60 percent of each punitive damages award in Oregon is allocated to the State's Criminal Injuries Compensation Account. In this litigation, Philip Morris has taken the position that the MSA "provides for a release (or, in the alternative, an offset) of the State of Oregon's portion of the punitive damages verdict and judgment[.]" (Jt. App. 292a). Oregon disputes that claim. However, if Philip Morris were to prevail on that argument, it might be subject to a far smaller punitive damages award than the jury awarded. Because under those circumstances the award's deterrent effect could be proportionally decreased, the MSA does not logically support a decrease in the amount of punitive damages awarded.

CONCLUSION

"[E]xemplary damages imposed on a defendant should reflect 'the enormity of his offense.'" *BMW*, 517 U.S. at 575, quoting *Day v. Woodworth*, 54 U.S. 363, 13 How 363, 371 (1852). "[S]ome wrongs are more blameworthy than others." *Id.* In this case, the Oregon Supreme

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[4] The Master Settlement Agreement is available online at http://www.naag.org.

Court properly determined that the jury fashioned the punishment to fit Philip Morris's egregious actions. Given that the touchstone of due process is a "concern for reasonableness," the Oregon Supreme Court's decision should be affirmed and the $79.5 million punitive damages award against Philip Morris upheld. *See TXO*, 509 U.S. at 458, citing *Haslip*, 499 U.S. at 18 (reviewing the petitioner's "excessive fines" claim with "concerns for reasonableness" in mind).

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
JANET A. METCALF
KAYE E. MCDONALD
Assistant Attorneys General
Counsel for Petitioners

September 15, 2006

APPENDIX

APPENDIX A

LIST OF THE AMICI CURIAE

State of California
Bill Lockyer
Attorney General of California
1300 I Street, Suite 1740
Sacramento, California 95814

State of Maryland
J. Joseph Curran, Jr.
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202-2202

State of Minnesota
Mike Hatch
Attorney General of Minnesota
102 State Capitol
St. Paul, Minnesota 55155

State of Mississippi
Jim Hood
Attorney General of Mississippi
Department of Justice
P.0. Box 220
Jackson, Mississippi 39205-0220

State of Missouri
Jeremiah W. (Jay) Nixon
Supreme Ct. Bldg.
207 W High Street
Jefferson City, MO 65101

State of Montana
Mike McGrath
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401

State of New Mexico
Patricia A. Madrid
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508

State of Oklahoma
W.A. Drew Edmondson
Attorney General of Oklahoma
2300 N. Lincoln Blvd., Suite 112
Oklahoma City, Oklahoma 73105-4894

State of Utah
Mark L. Shurtleff
Attorney General of Utah
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, Utah 84114-2320

State of Wisconsin
Peg Lautenschlager
Attorney General of Wisconsin
114 East, State Capitol
P.0. Box 7857
Madison, Wisconsin 53707-7857

4760

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No. 05-1256

In the

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DEBORAH J. LA FETRA
TIMOTHY SANDEFUR
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTIONS PRESENTED

1. Whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.

2. Whether due process permits a jury to punish a defendant for the effects of its conduct on third parties.

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and economic freedom. In furtherance of PLF's continuing mission to defend economic liberty, the Foundation created its Free Enterprise Project. Through that project, the Foundation seeks to protect the free enterprise system from abusive regulation and a civil justice system that grants excessive liability awards. PLF has participated in several cases before the Supreme Courts of California, Illinois, New Jersey, and other states in cases involving the reach and scope of civil liability and the abuse of punitive damages. *See, e.g., Johnson v. Ford Motor Co.*, 113 P.3d 82 (Cal. 2005); *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63 (Cal. 2005); *Marshall v. Burger King Corp.*, No. 100372, 2006 WL 1703488 (Ill. June 22, 2006); *In re Lead Paint Litigation*, No. 58,531 (N.J. Sup. Ct. *cert. granted* Nov. 17, 2005); and PLF attorneys have published articles on the dangers that a runaway civil justice system poses to American consumers and entrepreneurs. *See, e.g.*, Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003); Deborah J. La Fetra, *A Moving Target: Property Owner's Duty to Prevent Criminal Acts on the Premises*, 27 Whittier L. Rev. ___ (forthcoming, 2006).

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been lodged with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case typifies the unfairness which the Due Process Clause was designed to prevent. Moreover, it is indicative of the growing trend toward "regulation by litigation," in which state courts are enthusiastically participating. This trend consists of courts using their power not to remedy the particular injury alleged by a particular party in a particular case, but instead to pursue broad policy goals thought to be good for society in general. *See* G. Edward White, *Tort Law in America: An Intellectual History* 178 (1985) (noting trend toward "conceiv[ing] of tort law as 'public law in disguise'" instead of being "concerned primarily with deterring and punishing blameworthy civil conduct").

When this occurs, lobbying groups try to exploit the judiciary as an alternative policymaking tribunal when their demands have not been met by the legislature. These parties, and their allies in the offices of state attorneys general, use crushing punitive damages awards, vaguely defined common law crimes—or, in this case, the reinterpretation of criminal statutes decades after the conduct in question occurred—and other judicial tools to pursue policy goals that are not part of the judiciary's proper role. The courts exist to remedy and punish harms in particular cases, not to pursue a broad policymaking goal outside the legislative process.

The Due Process Clause sets broad but strong barriers around the activities of state courts. Among these boundaries is the rule of fundamental fairness articulated in this Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)—that punitive damages must bear some sensible relationship to the compensatory damages awarded in a particular case. But here, the state court evaded this limit by redefining the conduct at issue as a crime, even though it was legal and reasonable when it occurred. *Cf. Bouie v. City of*

Columbia, 378 U.S. 347, 352 (1964) (states may not adopt "unforeseeable and retroactive judicial expansion of narrow and precise [criminal law] statutory language").

Moreover, the court below assessed punitive damages on the basis of Philip Morris' conduct toward third parties—the details of which can only remain speculative, based on no other evidence than the particularly egregious and emotionally powerful facts of the Plaintiff's own case. Rather than punishing Philip Morris for its conduct toward Mayola Williams, therefore, the Oregon Courts essentially passed judgment on Philip Morris' behavior as a corporate citizen. This is not due process of law. *State Farm*, 538 U.S. at 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

ARGUMENT

I

COURTS MAY NOT AVOID THE DUE PROCESS REQUIREMENT THAT PUNITIVE DAMAGES REASONABLY RELATE TO THE INJURY BY RETROACTIVELY ANALOGIZING CIVIL CONDUCT TO CRIMINAL CONDUCT

A. The Due Process Clause Rightly Restricts the Awarding of Punitive Damages

The earliest, and still the best, exposition of the meaning of "due process of law" came in Daniel Webster's argument in *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819). Due process of law is "a law which *hears before it condemns*, which *proceeds upon inquiry and renders judgment only after trial.* The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." *Id.* (argument of Mr. Webster) (emphasis added). *See also*

Hurtado v. California, 110 U.S. 516, 535-36 (1884); *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (incorporating Webster's definition).

Later courts have continued to acknowledge these three basic due process requirements. First, laws must fairly apprise a party of the conduct that will incur a criminal or civil penalty. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000). Second, the law must fairly apprise a party of the penalties that will be incurred by violating the law. *State Farm*, 538 U.S. at 417; *Gore*, 517 U.S. at 574. *See also* Robert A. Levy, *The Conservative Split on Punitive Damages*, 2003 Cato Sup. Ct. Rev. 159, 177 (2003) ("parties must be able to determine which conduct is necessary to conform to the laws dictates: and legal outcomes must be reasonably predictable"). Third, Webster's generality principle requires government to regulate for the general welfare, and not for private advantage or satisfaction. *Cf. Romer v. Evans*, 517 U.S. 620, 632 (1996).

In *Gore* and *State Farm*, this Court recognized that these due process considerations must apply to the amount of punitive damages assessed in tort cases. Punitive damages awards perform some of the same functions as criminal penalties, but because "civil defendants are not accorded the protections afforded criminal defendants, punitive damages pose an acute danger of arbitrary deprivation of property." *State Farm*, 538 U.S. at 417; *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994).

If due process did not constrain courts to rationality, predictability, and fairness in assessing punitive damages, defendants would be exposed to arbitrary and unfair punishment. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the harm caused"). This would violate "[e]lementary notions of fairness enshrined in our constitutional jurisprudence [that] dictate that a person

receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574.

In addition, the Due Process Clause requires that all government actions advance the genuine welfare of society at large, and not merely the private welfare of particular individuals or special interest groups. *Romer*, 517 U.S. at 632. *See also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984). The essential difference between due process of law and arbitrariness is that arbitrariness results from government employing its coercive force on behalf of private factions or individuals rather than society at large. Sunstein, *supra*; *see also* The Federalist No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961) ("In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature."). Due process requires that government employ its power for the general welfare, not for the private financial benefit of a few. *See Kelo v. City of New London*, 125 S. Ct. 2655, 2661-62 (2005). That is why this Court has declared that the power of a court to award punitive damages "is limited by the obligation to administer justice." *Standard Oil Co. of Indiana v. State of Missouri ex inf. Hadley*, 224 U.S. 270, 286 (1912).

This Court established guideposts in *Gore* and *State Farm* to help lower courts ensure against arbitrary and extreme punitive damages awards, and awards that benefit particular parties rather than society. In particular, the Court found that due process requires some reasonable ratio between the compensatory damages award and the punitive damages award. *Gore*, 517 U.S. at 580; *State Farm*, 538 U.S. at 418, 425. This ratio requirement ensures that private litigants do not exploit their individual injuries to obtain punitive damages awards far in excess of their actual harms, and which inure solely to their own private benefit. If a jury may award punitive damages in

any amount regardless of the compensatory damages, then the plaintiff's injury might serve as the proverbial tail wagging the dog of erratic, potentially massive punitive damages awards. This is the very definition of arbitrary and discriminatory enforcement. *Hill*, 530 U.S. at 732.

The courts should not serve as a tool for opportunistic litigants or their even more opportunistic attorneys to exploit government power to extract punitive damages—*i.e.*, private profits—from defendants without some sensible ratio between the injury actually suffered and the punitive damages awarded. This Court's basic holdings in *State Farm* and *Gore* were correct and should be preserved.

B. Retroactively Describing Conduct as Analogous to Criminal Conduct to Evade the Ratio Requirement Violates Due Process

The Oregon Supreme Court found that it could "overrid[e]" this Court's due process "concern[s]" by declaring Philip Morris' conduct to be highly reprehensible. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1181 (Or. 2006). It found this reprehensibility by retroactively redefining its criminal laws so as to analogize Philip Morris' conduct to manslaughter. *Id.* at 1179-80. But the court's hindsight reinterpretation of the state's manslaughter statute is fundamentally arbitrary and a violation of due process standards.

The court essentially recharacterized acts that were neither reckless at the time, nor committed without due caution, as analogous to criminal conduct. Yet Philip Morris was never charged with this crime in its many decades of operation, and until the lower court's decision in this case, the idea that Philip Morris had committed something akin to manslaughter would have been rejected as an unreasonable application of the law. *Cf. Bouie*, 378 U.S. at 353 (state may not make an action which was innocent when done criminal or aggravate a crime or make it greater than it was, when committed).

In *Bouie*, civil rights demonstrators entered a store during normal business hours and took seats in the restaurant section. An employee posted a no trespassing sign and the police arrested the plaintiffs, who were convicted of criminal trespass under South Carolina's trespass law. This Court reversed the convictions because the South Carolina Supreme Court's interpretation of the trespass law had enlarged the statute's reach to include the plaintiff's actions, and then retroactively applied the new definition to uphold the convictions. Because this was "punish[ing] them for conduct that was not criminal at the time they committed it," the South Carolina Court's decision "violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." *Id.* at 350. The Court specifically found that when "construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Id.* at 354-55.

In a similar manner, the Oregon Supreme Court redefined the recklessness element of its manslaughter statute to declare that Philip Morris' decades-long denial of a scientifically proven connection between smoking and cancer was criminally reckless. Yet at the time that Philip Morris did this, when Ms. Williams began smoking and for many years afterward, it was reasonable for the company to dispute the early scientific studies on the danger of its products, and, more importantly, courts at the time found no civil or criminal fault in the actions of Philip Morris or other tobacco companies. *See, e.g., Green v. Am. Tobacco Co.*, 304 F.2d 70, 76 (5th Cir. 1962) (tobacco companies "could not be held liable . . . against consequences of which no developed human skill and foresight could afford knowledge"); *accord, Ross v. Philip Morris & Co., Ltd.*, 328 F.2d 3, 10 (8th Cir. 1964). *See also* Milby Amott McCarthy, *Tobacco Suits Today: Are Cigarette Plaintiffs Just*

Blowing Smoke, 23 U. Rich. L. Rev. 257 (1989) ("[U]ntil the 1988 decision in *Cipollone v. Liggett Group, Inc.*, no plaintiff had won a products liability suit against a tobacco company."). Indeed, the Fifth Circuit Court of Appeals ruled in 1962 that cigarettes were reasonably fit for the purpose for which they were sold. *Green*, 304 F.2d at 76.

To suggest that Philip Morris' activities "in 1954" of selling cigarettes, and disputing the then-uncertain scientific research on tobacco's harmful effects "would have constituted manslaughter," *Williams*, 127 P.3d at 1179, is absurd and arbitrary—a fundamentally *ipse dixit* conclusion based on a retroactive reinterpretation of the law. This violates the Due Process Clause's prohibition against "judgments without notice." *Gore*, 517 U.S. at 574 n.22 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (Stevens, J., concurring in judgement)).

C. Allowing Courts to Use a Defendant's Egregious Conduct to Depart from the *Gore* Ratio Requirement Would Lead to Inconsistent Punitive Damages Decisions

If courts may depart from the ratio requirement of the Due Process Clause on the grounds that a defendant's conduct was especially egregious, lower courts will be free to apply or to ignore this guidepost essentially at will. An "egregiousness exception" to the *Gore* ratio requirement could shield cases involving unpopular or unsympathetic defendants (insurance companies, for example) from judicial review, when these are precisely the cases in which juries are likely to grant excessive punitive damages awards. *See Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979) ("it cannot be ignored that punitive damages may be employed to punish unpopular defendants").

A punitive damages award motivated on the basis of passion or prejudice is fundamentally unfair. *Wanamaker v. Lewis*, 173 F. Supp. 126, 128 (D.D.C. 1959); *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 403 (Mich. 2004), *cert. denied*, 126 S. Ct. 354 (2005). Yet the more unpopular the defendant, the more likely the jury is to decide that the defendant's conduct was reprehensible, and the more likely it is to base its punitive damages award on passion or prejudice rather than reason and deliberation. *See Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("punitive damages are frequently based upon the caprice and prejudice of jurors"). If reprehensibility authorizes juries to disregard the *Gore* ratio, therefore, punitive damages awards will be insulated from due process review in *precisely those cases* in which judicial review is most necessary. This problem is accentuated by the fact that "a jury's determination of a defendant's reprehensibility is notoriously difficult for an appellate court to review." Andrew C.W. Lund, *The Road From Nowhere? Punitive Damage Ratios After BMW v. Gore and State Farm Mutual Automobile Insurance Co. v. Campbell*, 20 Touro L. Rev. 943, 968 (2005).

Moreover, allowing reprehensibility to override the ratio guidepost invites attorneys to emphasize the sort of emotionally inflammatory facts, and to employ the type of incendiary rhetoric, that encourages juries to apply inconsistent and unfair punitive damages awards. In *Gilbert*, the Michigan Supreme Court reversed a compensatory damages award in a sexual harassment case after the trial attorney employed inflammatory rhetoric and tactics, including "equat[ing] plaintiff with the victims of the Holocaust," 685 N.W.2d at 403, likening the plaintiff to a dog that had been kicked, *id.* at 404, and "play[ing] on prejudice against corporations." *Id.* There is no question that the plaintiff in that case was subjected to reprehensible and egregious sexual harassment, but these "hyperbolic and vitriolic argument[s]," *id.* at 406, contributed to a jury award of $21

million, which was "the largest recorded compensatory award for a single-plaintiff sexual harassment suit in the history of the United States." *Id.* at 394. Although punitive damages were not awarded because they are limited by statute in Michigan, *see id.* at 400, it is reasonable to assume that such an award would have been vastly greater had it been allowed.[2] A reprehensibility exception to the *Gore* factors would have insulated such a verdict from judicial review.

Even in the absence of inflammatory rhetoric by attorneys, allowing reprehensible conduct to override the *Gore* ratio requirement would undermine that requirement's effectiveness as a limitation on jury discretion. Juries award punitive damages with high ratios when a defendant's acts are highly offensive, and award punitive damages with low ratios when the converse is true. Lund, *supra*, at 953. Therefore, whenever a jury awards punitive damages with high ratios, judges will use the defendant's reprehensibility to justify an otherwise unconstitutional award, as opposed to the "few" nonratio awards that the Court envisioned in *State Farm*, 538 U.S. at 425. Judges and particularly juries can be convinced of the propriety of virtually any amount of punitive damages in almost any case in which the plaintiff has shown entitlement to receive some punitive damages. Cass R. Sunstein et al., *Punitive Damages: How Juries Decide* 58 (2002) (describing how

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[2] In *Engle v. Liggett Group, Inc.*, No. SC03-1856, 2006 WL 1843363 (Fla. July 6, 2006), the Florida Supreme Court evaluated the inflammatory rhetoric employed by an attorney in a notorious tobacco-related lawsuit. Among other things, the plaintiff's attorney "appear[ed] to compare the tobacco industry with slavery and, by invoking civil rights leaders Rosa Parks and Martin Luther King, appealed to the jury's sense of outrage for the injustices visited upon African-Americans in this country." *Id.* at *18. Nevertheless, the court refused to find that the jury's award of $145,000,000,000 in punitive damages (one-third of Florida's entire GDP) was influenced by passion and prejudice. *Id.* at *19.

jurors' predeliberation tendencies to award punitive damages are transformed into ever more unpredictable and larger awards through the process of deliberation; *e.g.*, "once the jury has agreed that there will be a nonzero dollar award, the arguments for a larger award have a rhetorical advantage and are more persuasive . . . those who argue that 'more' money is necessary to punish a corporation appear to have an upper hand. The unbounded dollar scale affords great latitude in the expression of what 'more' means."). *See also* David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 Colum. L. Rev. 1139, 1141 (2000) (finding "a systematic rhetorical advantage held by those arguing for higher dollar awards, an advantage that operates independently of the particular case at issue").

Since this Court's decisions in *Gore* and *State Farm*, lower courts have failed to apply the punitive damages guideposts in a uniform manner. Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. Mich. J.L. Reform 441, 468 (2004). *See also Schimizzi v. Ill. Farmers Ins. Co.*, 928 F. Supp. 760 (N.D. Ind. 1996) (reducing punitive damages to approximately 3 times the compensatory damages of $45,000); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (reducing punitive damages award with ratio to compensatory damages of 140:1 to 10:1); *Baribeau v. Gustafson*, 107 S.W.3d 52 (Tex. App. 2003) (upholding $200,000 punitive damages award despite only $500 compensatory damages because reducing punitive damages would not punish or deter egregious conduct); *Johnson*, 113 P.3d 82 (allowing consideration of effects of defendants' acts on third parties when assessing punitive damages); *Simon*, 113 P.3d 63 (reversing primitive damages award based on speculative potential harms that did not occur).

Although some courts have conscientiously applied the ratio requirement to restrain punitive damages awards, Lund,

supra, at 985, others have regularly ignored or overridden the ratio requirement by finding that a defendant's degree of reprehensibility justifies a punitive damages award with a ratio to the compensatory damages award greater than four-to-one. Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won't Be the Last Word*, 37 Akron L. Rev. 779, 798 (2004). The result is inconsistent punitive damages awards. Chanenson & Gotanda, *supra*, at 468.

D. Allowing State Courts to Evade the Ratio Requirement in This Way Would Harm Society Through Overdeterrence and Inconsistency

"[R]unaway punitive damages are not good for the legal system." Heather Burgess, *State Limits: Can One State Rule the Country? One State Awarding Punitive Damages for Nationwide Conduct*, 31 Pepp. L. Rev. 477, 478 (2004) (quoting Kennedy, J.). They are inconsistent with the State's goal of deterring future wrongdoing, and they have damaging economic consequences. W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 Emory L.J. 1405, 1407 (2004).

Excessive punitive damages awards run a serious risk of overdeterrence because the potential of devastating liability in a single lawsuit will lead companies to hesitate in investing in or experimenting with new products. These companies owe a duty to their stockholders, however, which means that they will become increasingly likely to stick to tried and true products that have not resulted in lawsuits. The result is to stifle innovation. *See also* W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 326 (1998) ("High damage levels suppress innovation across the board. Firms in effect stop innovating because of the substantial penalty that they suffer for new and uncertain product introductions, as opposed to better established technologies.").

Consider the hypothetical situation of BetterDrugs, an established pharmaceutical company that for 50 years has sold Drug A, which has proven effective for 10 percent of breast cancer patients, and has no serious side effects. BetterDrugs considers developing Drug B, a scientific breakthrough which it believes will cure 50 percent of breast cancer patients. But it knows that a competing pharmaceutical company, DifferentDrugs, recently lost a case in which the jury awarded $1 million in compensatory damages and $97 million in punitive damages to the victim of an unforeseen side effect of one of DifferentDrugs' products. DifferentDrugs had conducted extensive safety testing and received government approval, but only discovered the side effect after marketing the drug. The punitive damages award bankrupts DifferentDrugs. Knowing that no matter how extensive its testing, there is always a nonzero chance that Drug B will cause harmful side effects; BetterDrugs would be acting reasonably and responsibly to play it safe, selling its old drug and avoid exposure to potential bankruptcy that would result from pursuing the new drug. The scientific breakthrough is not marketed, innovation is discouraged, and society loses.

This, unfortunately, is not an entirely hypothetical scenario. *See generally* La Fetra, *Freedom*, *supra*, at 648-54. In 1980, eight pharmaceutical manufacturers produced the DPT vaccine; yet, by 1986, there were only two. H.R. Rep. No. 99-908, at 6-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6347-48. According to the American Medical Association, "[i]nnovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance. Certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks." AMA Board of Trustees, *Impact of Product Liability on the*

Development of New Medical Technologies 12 (June 1988) *quoted in* S. Rep. No. 105-32, at 9 (1997).[3] In 1992, *Science* magazine reported that two companies had delayed research on an AIDS vaccine as a result of liability concerns. *Supra*, at 10, *citing* Jon Cohen, *Is Liability Slowing AIDS Vaccines?*, Science, Apr. 10, 1992, at 168-69.

In addition to the overdeterrence effect, the availability of extreme punitive damages awards encourages individuals and companies to invest their resources in litigation—either in seeking opportunities to bring cases for potential windfall damages awards, or in overpreparing for defense of such lawsuits—rather than in research, development, or other economically efficient directions. The availability of windfall punitive damages awards sets up a classic rent-seeking situation, which encourages parties to engage in nonproductive activity such as litigation rather than in wealth-creating activity. *See generally*, Gordon Tullock, *Rent Seeking as a Negative-Sum Game*, *in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 16 (James M. Buchanan et al. eds., 1980); *Cf.* James Buchanan & Gordon Tullock, *The Calculus of Consent* 111 (Ann Arbor Paperbacks 1965) (1962) ("[B]argaining opportunities afforded in the political process *cause the individual to invest more resources in decision-making*, and, in this way, cause the attainment of 'solution' to be much more costly."). This harms the public because it distracts people and businesses from productive pursuits.

Finally, allowing excessive punitive damages awards actually undermines their effectiveness as deterrents to wrongful behavior. As the amount and frequency of such awards becomes increasingly unpredictable and disconnected from the behavior it is intended to deter, companies will seek to

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[3] *Available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_reports&docid=f:sr032.105.pdf (last visited July 15, 2006).

avoid such damages, not by avoiding that behavior, but by insuring against risk as a whole; they will simply assume that punitive damages are a "cost of doing business," which cannot be avoided regardless of their behavior, but must simply be accepted. "[E]xtremely large awards . . . are highly unpredictable. As a result, these large awards do not have a deterrent effect because the penalties for wrongful conduct are not anticipated. Indeed, empirical evidence suggests that there is no significant safety incentive effect from punitive damages." Viscusi, *Blockbuster*, *supra*, at 1407.

Encouraging the use of a "reprehensibility" criterion among lower courts will only exacerbate these problems. Reprehensibility is a highly subjective term, and its lack of definition will encourage inconsistency in punitive damages awards. Chanenson & Gotanda, *supra*, at 443. In some cases, such as the Ford Pinto case, *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981), reprehensibility was found solely on the basis that a product manufacturer was aware that there was some amount of risk associated with the product. *See* Sunstein et al., *supra*, at 231 ("any kind of corporate risk analysis was a 'red flag' that increased the rate of verdicts against the defendant and the magnitude of the dollar damages award"); Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 Rutgers L. Rev. 1013, 1035-36 (1991). Yet every product has some risk, which manufacturers must balance against the product's benefits. *See id.* at 1067 ("the process by which manufacturers render such trade-off design decisions seems not only to be anticipated but endorsed by the prevailing risk-benefit standard for design liability").

Researchers recently conducted over 600 mock-juror sessions to study juror behavior with regard to punitive damages. *See generally* Sunstein et al., *supra*. These researchers concluded that when a company adopts a higher value-of-life estimate in its analysis of what it is worth to save a life, juries impose punitive damages awards an incredible

47% greater than when companies adopt lower value-of-life estimates. *Supra*, at 126 ("Undertaking a cost-benefit analysis of risk does not help a company but instead boosts the value of punitive damages awarded."). This has the "perverse effect" of rewarding companies that place lower values on the risks involved in their products. *Supra*, at 129.

Because juries erroneously yet routinely take this cost-benefit analysis as an indicator of reprehensible conduct, allowing reprehensibility to overcome the *Gore* ratio requirement will accentuate the economic harms caused by excessive punitive damages awards. As one commentator notes,

> if mere knowledge of risk tradeoffs is taken to demonstrate an intent to conceal, then manufacturers could easily be found guilty of concealment by intent. Manufacturers of potentially injury-causing products such as automobiles will almost of necessity generate documents measuring the risk. No manufacturer could publicize all of these documents, which typically contain preliminary estimates that turn out to be erroneous along with crude estimates of myriad potential harms associated with reasonable tradeoffs. If the existence and nondisclosure of such documents becomes evidence of concealment, and therefore the basis for punitive damages, then again the system will not operate properly. Firms would be subjected to unlimited damages for efficient behavior.

Paul H. Rubin et al., *BMW v. Gore: Mitigating the Punitive Economics of Punitive Damages*, 5 Sup. Ct. Econ. Rev. 179, 190 (1997).

Furthermore, if "a jury believes a defendant is guilty of outrageous conduct and deserves to be punished, it might award larger amounts as compensation, particularly if the plaintiff has

portrayed the defendant as a large, deep-pocketed Goliath." J. Stephen Barrick, *Moriel and the Exemplarly Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 Hous. L. Rev. 1059, 1084-05 (1995). The deterrent effect of large punitive damages is lost as there is no longer any incentive for businesses to take preventative measures when they cannot limit their liability. Viscusi, *Blockbuster*, *supra*, at 1407.

II

THE DUE PROCESS CLAUSE DOES NOT ALLOW COURTS TO PUNISH DEFENDANTS FOR CONDUCT TOWARD THIRD PARTIES

A. Punitive Damages Awards Must Comply with Due Process Standards Including Fair Notice

Just as vague or overly broad statutes violate due process by exposing parties to unpredictable punishments and the possibility of arbitrary and discriminatory enforcement, *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), so, too, allowing a party to be subjected to punishment for wrongs it is *assumed* to have committed against parties who are not in court, and whose factual circumstances are impossible to determine, is a fundamental violation of Due Process. *See State Farm*, 538 U.S. at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis."). A legal regime in which a party can be charged with responsibility for wrongs without a hearing, or in which a party can be punished without an opportunity to assess and challenge the charges brought against him, is fundamentally unfair, a violation of the substantive standards that underlie the Due Process Clause in both its "substantive" and "procedural" dimensions. *See, e.g., Bouie*, 378 U.S. at 352-55; *Lankford v. Idaho*, 500 U.S. 110, 126-27 (1991).

A plaintiff would not, in any other context, be allowed to ask a court simply to assume that a defendant has committed similar harms against other parties, and on that basis to increase the defendant's punishment. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("'Due process requires that there be an opportunity to present every available defense.'" (Quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932))); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact [in civil cases] . . . remains at all times with the plaintiff."); *Speiser v. Randall*, 357 U.S. 513, 524 (1958) ("In civil cases too this Court has struck down state statutes unfairly shifting the burden of proof."); *Western & A.R.R. v. Henderson*, 279 U.S. 639 (1929) (state may not allow jury to presume negligence in civil cases). *Cf. Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (character evidence is generally prohibited in criminal cases because it "weigh[s] too much with the jury and . . . so overpersuade[s] them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge"). Yet in this case, Philip Morris had its punishment increased on the basis of speculative presumptions that it harmed other parties elsewhere.

Even in mass tort litigation brought in the form of class action lawsuits, the defendant must have an opportunity to challenge whether "each class member" was injured, and if so, "whether defendants . . . caused that [injury]." *Arch v. The Am. Tobacco Co., Inc.*, 175 F.R.D. 469, 489 (E.D. Pa. 1997). *See also id.* at 493 (noting that it "would abrogate the constitutional rights of defendants" for plaintiffs to recover for damages proven only on a "class-wide basis"). "Although many common issues of fact and law will be capable of resolution on a group basis, individual particularized damages still must be proved on an individual basis." *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1200 (6th Cir. 1988).

Similarly, a criminal defendant cannot be convicted of a substantively greater crime than that with which he was charged, simply by redefining an element of a crime as a "sentencing factor," and thereby increasing the sentence in the absence of the jury. *See Jones v. United States*, 526 U.S. 227, 232 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)[4] ("any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). Yet here, Philip Morris has been punished not only for wrongs done to Mayola Williams, but for wrongs alleged to have been committed against an unknown number of unidentified third parties under unknown circumstances—wrongs analogized to criminal manslaughter—with no opportunity to contest these accusations in a court of law.

If punitive damages only punished a defendant for harm to society, they would work parallel to criminal law but would lack the due process restrictions provided in criminal law. *See* W. Page Keeton, *Prosser and Keeton on Torts* 11 (5th ed. 1984) (punitive damages are "in the form of a criminal fine . . . [but] imposed without the usual safeguards thrown around criminal procedure, such as proof of guilt beyond a reasonable doubt, the privilege against self-incrimination, and even the rule against double jeopardy"); *Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting) ("although punitive damages are 'quasi-criminal,' their imposition is unaccompanied by the types of safeguards present in criminal proceedings" (citation omitted)). That would violate the Fourteenth Amendment. Therefore, this and other courts have found that punitive damages vindicate the

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[4] The principles underlying *Jones*, *Bouie*, and *Apprendi* are not distinguishable just because those cases involved criminal charges while this is a civil case. The Fourteenth Amendment prohibits states from depriving any person of liberty or property without due process of law, in either criminal or civil proceedings. *Gore*, 517 U.S. at 574 n.22.

particular injury to a particular plaintiff, rather than society's interests in general. *See, e.g., State Farm*, 538 U.S. at 423 (courts may not use the punitive damages award as an opportunity to "adjudicate the merits of other parties' hypothetical claims against a defendant"). Moreover, due process restrictions *do* apply to punitive damages. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-54 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-20 (1991).

Due process is offended when a party is punished for alleged wrongs without having the opportunity to defend itself or test each particular charge. Yet it has become routine for trial level tort attorneys to ask juries to award punitive damages based on *all* of the defendants' allegedly wrongful conduct—the nature and circumstances of which are inherently speculative—rather than on the injury to the plaintiff herself. *See, e.g., Gore*, 517 U.S. at 564 (plaintiff's attorney argued that jury should "provide an appropriate penalty" for harming 1,000 people); *State Farm*, 538 U.S. at 415 (parties sought damages based on projections of "a national scheme to meet corporate fiscal goals by capping payouts on claims company wide"); *Ripa v. Owens-Corning Fiberglas Corp.*, 660 A.2d 521, 535 (N.J. Super. Ct. App. Div. 1995) (noting that, "in numerous . . . cases . . . juries have been requested to punish defendant for its alleged entire course of conduct"); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1056 (D.N.J. 1989) ("[E]ach jury is told how many persons have been injured or have died or are likely to do so as the result of the defendant's conduct. Those statistics undoubtedly play a substantial role in the jury's . . . determining the amount [of punitive damages] to be imposed."), *vacated in part on reconsideration*, 718 F. Supp. 1233, 1234 (D.N.J. 1989) ("The court abides by its ruling that multiple awards of punitive damages for a single course of conduct violate the fundamental fairness requirement of the Due Process Clause, but concludes that equitable and practical concerns prevent it from fashioning a fair and effective

remedy."). *See also* Walter K. Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* 19-20 (2003) (describing how attorneys in tobacco litigation have evaded requirements for individualized proof of wrongdoing).

As Professor Colby concludes,

> If due process will not permit a defendant to be tagged with compensatory damages for the wrongs that it visited upon a large number of people without being afforded the opportunity to contest individual elements of each alleged victim's claim and to raise victim-specific affirmative defenses, it cannot tolerate the imposition of punitive damages in these circumstances . . . . The defendant can be punished . . . for the harm caused to third parties only if it committed legal wrongs against all of those parties.

Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 657 (2003).

Unfortunately, courts have been lax in enforcing traditional due process limits in cases involving punitive damages. *See State Farm*, 538 U.S. at 417 (punitive damages "serve the same purposes as criminal penalties [yet] defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns."); *Hines*, *supra*, at 780 ("For . . . 125 years . . . no special procedures or precise rules of law were deemed necessary to constrain state courts' imposition of such [punitive] damages."). Thus, recent years have seen a vast expansion of the scope and extent of punitive damages. *See* Rubin, *supra*, at 192 (noting "strongly upward trend" in punitive damages awards); Viscusi, *Blockbuster*, *supra*, at 1413 ("extremely large punitive damages awards are increasing in

frequency and increasing in total value"). The mere fact that punitive damages have not received much due process scrutiny in the past cannot justify allowing such unbridled discretion to remain. *Cf. Tennessee v. Garner*, 471 U.S. 1, 13-15 (1985) ("though the common-law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied").

The realms of criminal law, or of evidence, or of other areas of the law, are limited by constitutional, statutory, and common law restrictions which direct the courts' discretion and prevent arbitrariness. This Court's decisions in *Gore* and *State Farm* hold that punitive damages awards must be cabined within similar fairness principles. *State Farm*, 538 U.S. at 416-17; *see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 298 (1989) (O'Connor, J., concurring in part) ("A governmental entity can abuse its power by allowing civil juries to impose ruinous punitive damages as a way of furthering the purposes of its criminal law."). To allow states unbridled discretion to award punitive damages for speculative harms to unidentified third parties under unknown circumstances, would deprive defendants of property and liberty without due process of law.

B. Punitive Damages Satisfy Due Process Only When They Are Directed at the Defendant's Particular Wrong in a Particular Case

Early courts and commentators recognized that punitive damages awards posed a threat to due process principles. *See generally* Colby, *supra*, at 613-50; *Wade*, 461 U.S. at 58 (Rehnquist, J., dissenting). *See also* W. Page Keeton, *supra* ("The policy of giving punitive damages has generated much controversy."). These early judges and scholars complained that the concept of punitive damages was not limited by clear legal constraints, punished more than once for the same offense,

unreasonably combined civil and criminal law, and "demoralized an honorable profession by the prizes held out to the litigious and unscrupulous, and their advocates in court expecting to share in the promised confiscation of another man's property." *Quoted in* Edward C. Eliot, *Exemplary Damages*, 29 Am. L. Reg. 570, 577 (1881).

A famous debate broke out between Professor Simon Greenleaf of Harvard and U.S. Attorney Theodore Sedgwick, in which Greenleaf argued that punitive damages were unconstitutional and unjust. *See* Colby, *supra*, at 617-18. Sedgwick contended that they vindicated society's interests over and above the plaintiff's interest. *Id.* at 618. Following Greenleaf, several courts found that punitive damages should not be allowed, because of the dangerously vague standards that apply to them. *See, e.g., Fay & UX v. Parker*, 53 N.H. 342, 397 (N.H. 1872), *Stillson v. Gibbs*, 18 N.W. 815, 817 (Mich. 1884); *Quigley v. Cent. Pac. R.R. Co.*, 11 Nev. 350, 373 (1876) (Beatty, J., concurring); *Austin v. Wilson*, 58 Mass. (4 Cush.) 273, 275 (Mass. 1849) ("If [punitive] damages are ever recoverable . . . they cannot be recovered in an action for an injury which is also punishable by indictment . . . . If they could be, the defendant might be punished twice for the same act.").

In the nineteenth century, courts resolved this dispute by holding that, whatever their flaws, punitive damages had been an accepted common law practice for centuries. *See Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851); *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. (1 Otto.) 489, 492 (1875); *see also Pac. Mut. Life Ins. Co.*, 499 U.S. at 17-18. More importantly, courts held that the Constitution is satisfied so long as punitive damages were awarded on the basis of particular injuries in identifiable cases, and not to vindicate society's interests in general. *See, e.g., Barry v. Edmunds*, 116 U.S. 550, 562 (1886) ("[punitive] damages [are] calculated to vindicate [the plaintiff's] right[s]"); *Brown v. Swineford*, 44 Wis. 282,

288 (1878) ("Though they are allowed beyond compensation of the private sufferer, [punitive damages] . . . are for the punishment of the private tort, not of the public crime."); *Ward v. Ward*, 41 Iowa 686, 688 (Iowa 1875) ("[punitive] damages are never allowed alone for the purpose of public good through the example given in their assessment. The effect upon the public is but an incident . . . ."); *Watts v. S. Bound R.R. Co.*, 38 S.E. 240, 242 (S.C. 1901) ("punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right").

This view has been reiterated in modern cases. In *Browning-Ferris*, 492 U.S. 257, for example, the Court rejected the argument that the Eighth Amendment limits punitive damages awards, because the Eighth Amendment is concerned "with criminal process and with direct actions initiated by government to inflict punishment," *id.* at 260, and punitive damages are aimed at a party's own particular injury. *See id.* at 275 ("punitive damages advance the interests of punishment and deterrence . . . [but are still] between private parties").

Moreover, the *Gore* proportionality principle is "a direct remnant" of the view that punitive damages are based on the injury to the particular plaintiff, and not on the total harms alleged to have been committed by the defendant. Colby, *supra*, at 639. It would make no sense to require that punitive damages relate to compensatory damages if punitive damages operated only to vindicate society's interests, rather than the plaintiff's own injury. *See also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986) (punitive damages "are available only on a showing of the requisite intent" to harm the plaintiff).

The constitutional validity of punitive damages was therefore resolved on the theory that they punish the "private wrong to the victim and, in so doing, also benefit the public, but the public benefit is, in a sense, a welcome incidental effect of

private punishment." Colby, *supra*, at 636. Constitutionally valid punitive damages are based on the plaintiff's actual injury, and are not social remedies assessed for harms against society as a whole. Societal harms are reserved for criminal, not civil law.

If this theory is abandoned, and replaced with the view that punitive damages operate simply to vindicate social policy against a defendant for social wrongs as a whole, then the due process concerns that sparked the nineteenth century debate over the validity of punitive damages are rekindled. In this case, Philip Morris is alleged to have committed fraud against an unspecified number of unnamed parties, under unknown circumstances, and entirely on the basis of judicial speculation. *See, e.g., Williams*, 127 P.3d at 1170 n.1 (speculating that "thousands of Oregonians" were injured by defendant's conduct). Without being anchored in proven, compensated injuries, punitive damages become simply a secondary criminal law system which can inflict punishments without trial, without "proceed[ing] upon inquiry" or "hear[ing] before it condemns." *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 581 (argument of Mr. Webster), and without other safeguards such as the protection against double jeopardy, *cf. State Farm*, 538 U.S. at 423 (noting "the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains").

CONCLUSION

The judgment of the Oregon Supreme Court should be *reversed.*

DATED: July, 2006.

Respectfully submitted,

DEBORAH J. LA FETRA
TIMOTHY SANDEFUR
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

479F

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PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Oregon

AMICUS CURIAE BRIEF OF A. MITCHELL POLINSKY, STEVEN SHAVELL, AND THE CATO INSTITUTE IN SUPPORT OF PETITIONER

TIMOTHY LYNCH
Counsel of Record
MARK MOLLER
THE CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-0200

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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BRIEF *AMICUS CURIAE* OF A. MITCHELL POLINSKY, STEVEN SHAVELL, AND THE CATO INSTITUTE IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

A. Mitchell Polinsky is the Josephine Scott Crocker Professor of Law and Economics in the School of Law at Stanford University. He is also the Director of the John M. Olin Program in Law and Economics at Stanford Law School. Professor Polinsky holds a PhD in Economics from MIT and a Master of Studies in Law degree from Yale Law School, has taught at the Department of Economics at Harvard University and at Harvard Law School, and has been a professor of law and economics at Stanford since 1979. He is well known both nationally and internationally in the field of law and economics. His textbook, *An Introduction to Law and Economics*, has been used at over fifty law schools and economics departments in the United States. Professor Polinsky has written approximately seventy scholarly articles, mostly on the economic analysis of legal issues. He has served as President of the American Law and Economics Association, and has been both a Guggenheim Fellow and a Fellow of the Center for Advanced Study in the Behavioral Sciences at Stanford University.

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[1] The parties have filed blanket written consents with the Clerk to the filing of *amicus* briefs in this case. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

Steven Shavell is the Samuel R. Rosenthal Professor of Law and Economics and the director of the John M. Olin Center for Law, Economics, and Business at Harvard Law School, as well as the co-director of the Law and Economics Program at the National Bureau of Economic Research. Professor Shavell has a PhD in economics from MIT, joined the faculty of the Department of Economics at Harvard University in 1974, and has been a professor of law and economics at Harvard Law School since 1982. He is an internationally known scholar in the economic analysis of legal issues and has worked extensively on tort law (he has published over twenty articles and a book in this subject area), as well as on litigation and deterrence theory. He is a past president of the American Law and Economics Association, is the co-editor of the *American Law and Economics Review*, is an elected fellow of the American Academy of Arts and Sciences and of the Econometric Society, and has been a Guggenheim Fellow. Professor Shavell has served as a consultant to government, including the Consumer Product Safety Commission, the Federal Trade Commission, the U.S. Department of Justice, and the U.S. Sentencing Commission.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it concerns the due process implications of excessive punishment.

SUMMARY OF ARGUMENT

In the case at issue, the widow of a smoker brought suit against Philip Morris. The jury found Philip Morris liable for fraud and awarded $821,485 in compensatory damages (reduced to $521,485 under Oregon's statutory ceiling on damages for wrongful death) and $79.5 million in punitive damages. After the Oregon appellate courts upheld the full amount of punitive damages, this Court granted certiorari and remanded the case for reconsideration in light of *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). On remand Oregon appellate courts upheld the full amount of punitive damages. Although the Oregon Supreme Court eschewed reliance on Philip Morris's wealth as a basis for upholding the punitive damages, the plaintiff has consistently relied on it in arguing that the punitive award is not excessive. Because she can be expected to do so again in this Court and because the issue of the proper role of corporate financial condition is an important and recurring one, *amici* believe that addressing that issue here may be of assistance to the Court. In examining that issue, we adopt a public policy, economic approach. Our conclusion, which has been articulated in part in A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998), is that the financial condition of a corporate defendant is irrelevant to either of the two goals of punitive damages.

Consider first the goal of *deterrence*, by which is meant inducing parties, through the threat of damages, possibly including punitive damages, to take adequate precautions and to otherwise behave in a socially responsible manner.

A common intuition holds that the wealth of a defendant is relevant to the magnitude of damages needed to deter. Deterring a millionaire from destroying his neighbor's flower garden out of spite will tend to require a higher level of punitive damages than deterring a person of average means—

because the millionaire will care less about having to pay any particular amount of damages than the average person.

This logic turns out to be valid only when the defendant's object is nonmonetary (for instance, the spiteful pleasure derived from destroying a flower garden). The logic does not apply when the defendant's motive is monetary. Then the defendant will be led to compare the monetary value of the benefit he would obtain from his contemplated improper behavior to the dollar damages he would have to pay, and the defendant will be deterred whenever the damages are greater—regardless of the defendant's wealth. Since the objective of corporations is monetary, the common intuition that the defendant's wealth should be taken into account in determining punitive damages does not apply to corporations.

Not only does the foregoing common intuition fail to apply to corporations, a closely related intuition—that a large corporation will alter its conduct only in response to large damage awards—is also invalid. Hence, we conclude that it is irrational to consider a corporation's wealth when determining the magnitude of punitive damages necessary to deter. In this case, the wealth of defendant Philip Morris should be irrelevant to punitive damages, with regard to the deterrence goal.

Moreover, if punitive damages greater than the level needed for deterrence are imposed, based on a mistaken belief that corporate wealth justifies enhanced damages, significant social disadvantages can result. As a general matter, inappropriately high punitive damage awards may lead corporations to take undue precautions, to charge excessive prices for products, and even to withdraw products from the marketplace. Additionally, imposing higher punitive damages on a corporation because it is wealthy acts as a tax on corporate success and is thus socially undesirable.

Second, consider the other goal of punitive damages, *punishment*, by which is meant penalizing blameworthy actors for their conduct. A common intuition holds that the wealth of a defendant is relevant to the magnitude of damages needed to punish. Punishing a millionaire will require imposing greater punitive damages than punishing a person of average means because the millionaire will care less about having to pay any particular amount of damages than the average person.

But this familiar intuition simply does not apply when the defendant is a corporation—for the basic reason that a corporation is not a person. Indeed, imposing punitive damages on a corporation often will not result in punishment of blameworthy individuals within it. A corporation may not punish its culpable employees or officers for a number of reasons, including that they may be hard to identify, may have retired, or may have died by the time punitive damages are imposed. Hence, the degree to which imposing punitive damages on corporations serves the punishment goal is considerably attenuated.

Still more attenuated is any connection between the wealth of a corporation and satisfaction of the punishment goal. Even if a corporation does penalize culpable individuals within it, there is no reason to believe that a wealthy corporation would penalize such individuals differently from a less wealthy corporation, and therefore no reason why the wealth of a corporation would matter to achievement of the punishment goal.

Unfortunately, and perversely, imposition of punitive damages on corporations tends to penalize individuals who bear little or no moral responsibility for corporations' wrongful acts. Specifically, the ones who tend to suffer the most from imposition of punitive damages are employees as a group, shareholders, and customers (because they may have to pay higher prices).

Hence, imposition of punitive damages on corporations, whether or not wealthy, does not tend to serve the punishment goal very well. The blameworthy may experience little or no punishment, whereas the relatively innocent may suffer the brunt of punitive damages.

The foregoing arguments lead to the conclusion that the factor of corporate wealth should play no role in determining the magnitude of punitive damages against Philip Morris.

ARGUMENT

As noted, we adopt a public policy, economic approach in our argument. In the first part below, we examine whether the wealth of a corporation should affect punitive damages in order to serve the deterrence objective of punitive damages. In the second part, we consider whether the wealth of a corporation should affect punitive damages in order to satisfy the punishment objective of punitive damages. These two objectives are the traditional goals of punitive damages that courts have endorsed.[2]

I. Increasing Punitive Damages In Light Of Corporate Wealth Does Not Serve The Objective Of Deterrence

A chief aim of tort law is to deter harmful behavior. This aim can generally be fostered by imposing damages, sometimes including punitive damages, on liable injurers, for that will tend to induce potential injurers to take reasonable

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[2] *See, e.g., BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) ("Punitive damages . . . are . . . intended . . . to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.").

precautions and to act in other ways to prevent harm. *See generally* Guido Calabresi, *The Costs of Accidents* (1970); William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (1987); *and* Steven Shavell, *Economic Analysis of Accident Law* (1987).

A. There Is No Need To Enhance Punitive Damages To Reflect Corporate Wealth

Is the wealth of potential injurers relevant to the magnitude of damages needed to properly deter them? A common intuition is that a wealthy individual must face larger damages to be deterred than an individual who is not wealthy. Consider an individual who, because of a disagreement with a neighbor, contemplates destroying the neighbor's flower garden for his spiteful pleasure. To discourage this individual from committing his act, he must face a threat of damages that is sufficiently high to offset the spiteful enjoyment he would experience from destroying the flower garden. That level of damages will ordinarily be higher for a wealthy individual than for a poor one, for dollars usually have less significance to the wealthy than to the nonwealthy. Perhaps $5,000 would be required to deter a wealthy individual from destroying the flower garden, but only $500 would be required to deter a person of modest means from so doing.

The view that high damages are required to deter a wealthy party turns out on reflection to be incorrect when, unlike in the example just given, the motivation for an act is *monetary*. (The motivation for the bad act in the example was *nonmonetary*—it was spiteful pleasure.) When a party's motivation is monetary, the party will be induced by the threat of damages to compare the monetary gain he would obtain from his act against the dollar damages in the same way regardless of his level of wealth. Suppose that an individual could save $100 by not purchasing a safety device. Clearly, the individual would be induced to spend $100 on

the device if he would have to pay more than that amount in damages, such as $200, for failure to do so.[3] And importantly, the individual would buy the device under these circumstances whether he is poor or rich: regardless of his wealth, he would prefer to spend $100 on the device than to pay $200 in damages.[4]

Similarly, because the motivation of corporations is monetary, namely, to make profits, the common intuition that the rich need to face higher damages to be induced to behave appropriately does not carry over to corporations. A corporation, like the individual in the last paragraph, will want to spend $100 on a safety device in order to avoid a $200 liability payment. Doing so will be rational whether the corporation has annual profits in the thousands of dollars or in the billions of dollars.

An additional reason sometimes advanced for why large corporations need to face higher damages to be appropriately deterred is that such corporations are bureaucratic and thus will not respond to liability risks unless the damages that would be imposed are high. In other words, high damages are needed to attract the attention of senior management. But this view is mistaken as a general matter. Although large corporations typically have complicated organizational structures, with senior management at some remove from the level of operations, it does not follow that large corporations will tend to be insufficiently attentive to the reduction of risk. If the cost of a precaution is less than the damages incurred

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[3] There are some complexities to this argument that arise when liability is uncertain due to so-called risk aversion, but these are of second-order importance, as discussed in Polinsky & Shavell, 111 Harv. L. Rev. at 913.

[4] The distinctions just drawn between the contexts in which gains are monetary and nonmonetary are also discussed in Polinsky & Shavell, 111 Harv. L. Rev. at 913-14.

by not taking it, a large corporation will want someone employed by it to recognize that fact and take the precaution—because the corporation's goal is to maximize profits. A large grocery chain, for example, will want some employee at each of its stores to inspect that store's floor after it is mopped in order to ensure that it is not slippery. The corporation might delegate this responsibility to an employee low in the corporate hierarchy, such as an assistant store manager. That this task would not receive the attention of top management, as it might in the case of a firm consisting of only one or two grocery stores, does not mean that the task will be neglected or attended to inadequately. As long as a corporation expects to have to pay for the harm it causes, it will generally have proper incentives to delegate tasks so as to reduce harms.

In all, then, the high wealth of a corporation should not result in an enhancement of punitive damages for purposes of deterrence. It follows that the argument made by the plaintiff that the wealth of Philip Morris is relevant to the determination of punitive damages is unsound with regard to the goal of achieving proper deterrence.

B. Socially Undesirable Consequences Will Result If Punitive Damages Are Enhanced To Reflect Corporate Wealth

We have just explained that there is no reason for punitive damages to be elevated on account of the wealth of a corporation, and we now discuss why imposing such punitive damages exceeding the level needed to deter is socially undesirable.

First, excessive punitive damages may induce potential injurers to undertake socially wasteful precautions. For example, many scholars attribute the costly phenomenon of defensive medicine—the use of tests and diagnostic procedures that cost more than their expected health benefits—to excessive damages in medical malpractice

cases.[5] The problem of wasteful precautions can even apply to intentional acts, including fraud, because, for example, corporations could be led to spend excessively policing the behavior of their employees.

Second, excessive punitive damages raise product prices and thereby harm consumers. Product prices generally reflect the costs associated with production, which include liability and legal costs. If punitive damage awards are excessive, then product prices will be excessive, undesirably reducing consumption by consumers. Consumers will be discouraged by high prices from buying products not because of a real social cost associated with their production, but rather because of mistaken imposition of punitive damages by the legal system.

Third, excessive punitive damages may lead companies to cease selling certain products. For example, liability awards are thought to have been an important factor in the withdrawal of vaccines and general aviation aircraft from the market.[6] Some may believe, however, that driving cigarettes from the market would be a good thing, but the decision in the case at issue will have implications for punitive damages and the prices consumers pay across the spectrum of products and services.

Fourth, excessive punitive damages may spur excessive litigation. Litigation is a major cost for society and increases the burden on the courts. Indeed, it is estimated that in the

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[5] *See, e.g.*, Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q. J. Econ. 353 (1996).

[6] *See, e.g.*, Don Dewees, David Duff, & Michael Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* 241-42 (1996) (vaccines); W. Kip Viscusi, *Reforming Products Liability* 8 (1991) (private airplanes).

area of torts, litigation and associated expenses actually equal or exceed the amounts received by victims.[7]

Finally, tying punitive damages to corporate financial condition taxes corporate size and success. Indeed, the effective punitive damages tax would likely be levied at a rate that increases perversely with corporate size—because larger companies tend to have more extensive operations than smaller companies and thus commit more torts. Suppose that a typical punitive damage award were to equal some percentage, such as 1%, of net worth. And suppose also that corporations commit one punishable tort for every $100 million of net worth. That would mean that a company with a net worth of $100 million would pay punitive damages of $1 million, equal to 1% of its net worth, whereas a company with a net worth of $1 billion, would pay punitive damages of $100 million, equal to 10% of its net worth, because it would be involved in 10 punishable torts. Such an outcome is not only anomalous and irrational; it also predictably would deter business growth and mergers and create incentives to employ subsidiaries when a company might not otherwise do so.

In sum, if corporate wealth is employed as a factor that enhances punitive damages, punitive damages will tend to be excessive and result in substantial negative consequences for our social well-being. It would be a mistake to view the imposition of excessive punitive damages as a matter only of unfairness or legal impropriety.

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[7] *See, e.g.*, Steven Shavell, *Foundations of Economic Analysis of Law* 281 (2004).

C. Punitive Damages Should Not Be Enhanced To Reflect Corporate Wealth

It follows from the discussion above that punitive damages should not be raised to reflect corporate wealth. On one hand, we have explained that there is no affirmative reason to elevate punitive damages to accomplish deterrence of misconduct by wealthy corporations. On the other hand, we have stated why imposing excessive punitive damages leads to socially undesirable consequences. Hence, it is irrational for society to raise the level of punitive damages to reflect corporate wealth, given the deterrence goal of punitive damages, and irrational to impose greater punitive damages on Philip Morris in this case on account of the wealth of Philip Morris.

II. Increasing Punitive Damages In Light Of Corporate Wealth Does Not Serve The Objective Of Punishment

A second and distinct aim of punitive damages is punishment, namely, penalizing blameworthy individuals to a degree that reflects their culpability.[8] Increasing punitive damages in light of corporate wealth does not serve this punishment objective.

A. There Is No Need To Enhance Punitive Damages To Reflect Corporate Wealth

A common intuition holds that punitive damages should be increased to reflect the wealth of injurers in order to achieve the punishment goal. The intuition is based on the notion that the greater the wealth of a person, the less any particular damage payment will matter to him. Hence, the magnitude of punitive damages needed to create a desired level of disutility for a wealthy person would be greater than

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[8] On the general aim of punishment, *see, e.g.*, George P. Fletcher, *Rethinking Criminal Law* § 6.3.2, at 417 (1978); *and* Herbert L. Packer, *The Limits of the Criminal Sanction* 37 (1968).

the magnitude of punitive damages needed to create that same level of disutility for a poor person. It might be, for instance, that $100,000 of punitive damages would be needed to create a desired level of disutility for a millionaire, whereas only $1,000 would be needed to create the same disutility for a person with modest assets.

This common and largely correct intuition does not carry over to corporations for a simple but fundamental reason: A corporation is not a person, and thus imposing punitive damages on a corporation does not in any direct sense punish a blameworthy person.[9] Before considering the factor of corporate wealth, let us explain how, if at all, imposing punitive damages on corporations serves the punishment objective.

When the defendant is a corporation, the imposition of punitive damages often does not promote the punishment objective. This is because imposition of punitive damages frequently fails to result in the punishment of culpable

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[9] *See also Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (Easterbrook, J.) ("For natural persons the marginal utility of money decreases as wealth increases, so that higher fines may be needed to deter those possessing great wealth. . . . Corporations, however, are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray."); David G. Owen, *The Problems In Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 16 (1982) ("[w]e must remember that the concepts of moral responsibility, punishment, and deterrence can mean vastly different things when judging the 'conduct' of an institution rather than of a human being").

individuals within the corporation.[10] It is true that corporations have an interest in discouraging conduct of their employees and officers that could result in damages, including punitive damages, and that corporations can seek to deter bad conduct through the use of internal sanctions, such as demotion and dismissal. However, several considerations suggest that the imposition of punitive damages on corporations will lead to less punishment of blameworthy individuals than might be supposed.

First, culpable employees and officers may not be punished by corporations because the corporations may have difficulty identifying them. Such individuals may be able to obfuscate their role in decisionmaking, which is often joint, or be able to conceal their behavior.

Second, even if culpable individuals within a corporation can be identified and punished, imposing punitive damages often will have little or no additional effect on their punishment. That is, the internal sanction imposed on such individuals may not be much (if at all) greater as a result of the corporation's bearing both punitive and compensatory damages than if the corporation had borne compensatory damages alone. When a corporation incurs high compensatory damages because of the blameworthy conduct of an identifiable employee or officer, it may want to levy whatever sanctions on him that it can; imposing punitive damages on the corporation then would not result in additional punishment of the individual.

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[10] We are here making the implicit assumption that if no culpable individuals are punished, the punishment objective cannot possibly be served. Under another conceivable view, however, the corporation would be treated as if it were a person, so that imposing punitive damages on the corporation would serve the punishment objective. We find such a view unappealing because a corporation is an artificial entity. *See* Polinsky & Shavell, 111 Harv. L. Rev. at 949-50.

Third, culpable individuals may simply be beyond the reach of punishment by a corporation because they have retired from the corporation or have died. This factor is particularly relevant in the present case, because the fraud for which Philip Morris was found liable occurred mainly decades ago.

Altogether, these factors make the satisfaction of the punishment objective uncertain and attenuated when punitive damages are imposed on corporations (as opposed to certain and undiluted when punitive damages are imposed directly on blameworthy individuals). The view that the imposition of punitive damages on a corporation automatically accomplishes punishment stems from anthropomorphizing the corporation and gives a false impression of reality.

Now let us consider whether raising punitive damages to reflect corporate wealth could serve the punishment objective. It is hard to see how. The level of punitive damages needed to induce a corporation to punish its culpable employees or officers ordinarily would not depend on its wealth. A $1 billion corporation and a $10 million corporation would both be expected to impose the same sanction on an employee for misconduct that resulted in a punitive damages award of a given amount. If the internal sanctions that corporations impose on culpable individuals within them do not depend on the corporations' wealth, as we would expect would normally be the case, the punishment objective will not be advanced by making punitive damages depend on corporate wealth.

To summarize, we have explained why the imposition of punitive damages on corporations is unlikely to foster the punishment objective, and that to whatever degree it does serve that objective, there is no punishment-related reason to raise the magnitude of punitive damages to reflect corporate wealth.

B. Socially Undesirable Consequences Will Result If Punitive Damages Are Enhanced To Reflect Corporate Wealth

Imposition of punitive damages on a corporation tends to penalize many individuals who are not blameworthy, a socially undesirable consequence given the goal of proper punishment.

One innocent group that may suffer when punitive damages are imposed on a corporation is the corporations' customers. The reason is that imposition of punitive damages may result in increased product prices, as we observed above, and thus reduce consumer welfare. Another group that may suffer is nonculpable employees and officers (culpable individuals are usually few in number), for punitive damages may put financial pressure on a corporation and detrimentally affect salaries and prospects for advancement. A third group that may suffer is shareholders, since corporate profits fall when punitive damages are imposed. Shareholders are normally dispersed and do not have a direct role in managing corporate affairs, so that their degree of moral responsibility for bad corporate behavior is low. (Indeed, shareholder responsibility is especially low when the wrongful conduct occurred decades ago, before most current shareholders made their purchases.) Significantly, these three groups—consumers, nonculpable employees and officers, and shareholders—are likely to bear the greatest part of the impact of punitive damages. In the case at hand, we suspect that virtually all of the $79.5 million of punitive damages will be borne by parties other than truly culpable parties, meaning that the imposition of punitive damages will in fact not serve the punishment objective.

It follows that to the degree that corporate wealth enhances punitive damages, the extent of inappropriate punishment of nonculpable parties will be increased, which is socially undesirable.

C. Punitive Damages Should Not Be Enhanced To Reflect Corporate Wealth

The logic of the two preceding sections implies that punitive damages should not be raised to reflect corporate wealth given the goal of proper punishment. We have explained that, as a general matter, the imposition of punitive damages on corporations is unlikely to foster the punishment objective because the truly culpable often are not punished, whereas those who are not culpable are likely to bear most of the impact of punitive damages. Against this background, raising punitive damages when corporations are wealthy serves no rational purpose and increases the amount of improper punishment.

CONCLUSION

The Court should reject any contention that the punitive damages can be justified on the basis of Philip Morris's financial condition.

Respectfully submitted.

TIMOTHY LYNCH
Counsel of Record
MARK MOLLER
THE CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-0200

Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300

THEODORE B. OLSON
Counsel of Record
THOMAS H. DUPREE, JR.
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

THEODORE J. BOUTROUS, JR.
DOMINIC LANZA
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Counsel for Amicus Curiae

QUESTION PRESENTED

This case involves a $79.5 million punitive damage award to a single individual in a product liability case recast as a "fraud" claim. Although the products at issue are tobacco products manufactured by petitioner, some variant of the due process questions presented by this case arises in virtually all product liability cases in which punitive damages are sought.

Amicus will address (1) the special dangers in the product liability context of the Oregon Supreme Court's approach allowing the reprehensibility guidepost to "override" the ratio guidepost when applying the due process standards established by *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003); and (2) the reasons why due process requires that juries be instructed that punitive damages must bear a reasonable relationship to the plaintiff's harm and that they may not be imposed to punish the defendant for alleged harm to individuals other than the plaintiff.

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 133 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 725 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached in the Addendum.

The due process questions presented by this case are not unique to Philip Morris or the tobacco industry. Virtually all corporations are vulnerable to arbitrary and excessive punitive damage awards when juries are not given adequate instructions, and reviewing courts decline to enforce the due process guideposts that help ensure reasonableness and proportionality. Because plaintiffs routinely seek punitive damages in product liability cases, and such cases present special

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, PLAC states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than PLAC or its counsel made a monetary contribution to the preparation or submission of this brief.

dangers and concerns, the fair administration of punitive civil sanctions is an issue of great importance to product manufacturers, and PLAC has filed *amicus* briefs in this Court's three most recent decisions involving constitutional excessiveness challenges to punitive damage awards: *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

STATEMENT

Respondent Mayola Williams, the widow of a smoker, sued petitioner Philip Morris USA, asserting fraud and negligence claims in connection with the death of her husband from lung cancer. Petitioner's Appendix ("Pet. App.") 1a. An Oregon jury awarded respondent $821,485 in compensatory damages—including $800,000 in non-economic damages—and $79.5 million in punitive damages. *Id.* at 9a.

Although the trial court remitted the punitive damage award as excessive under the federal constitutional guideposts, the Court of Appeals reinstated the award in full, 48 P.3d 824 (Or. Ct. App. 2002), and the Oregon Supreme Court denied review. 61 P.3d 938 (Or. 2002). This Court then granted certiorari, vacated the Court of Appeals' judgment, and remanded for reconsideration in light of *State Farm*. 540 U.S. 801 (2003). On remand, the Court of Appeals again held that the full award must be reinstated, notwithstanding the more rigorous *State Farm* standards. Pet. App. 35a.

The Oregon Supreme Court affirmed. The court emphasized that it was required to construe "all facts" in the light most favorable to plaintiff, and that so construed "there can be no dispute that Philip Morris's conduct was extraordinarily reprehensible." Pet. App. 23a.

The court acknowledged that the 97:1 ratio of punitive to compensatory damages exceeded the constitutional limits set forth in *State Farm*, stating that the ratio "substantially exceed[s] the single-digit ratio (9:1) that the Court has said or-

dinarily will apply in the usual case." Pet. App. 31a. Nonetheless, the court reasoned that Philip Morris's allegedly high level of reprehensibility sufficed to "overrid[e]" the ratio guidepost, explaining:

> Single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.

Id. at 33a. The court concluded that "the jury's $79.5 million punitive damage award against Philip Morris comported with due process." *Id.* at 2a, 33a. The court also held that Philip Morris was not entitled to a jury instruction providing, in part, that "[t]he size of any punishment should bear a reasonable relationship to the harm caused to [respondent's husband] Jesse Williams by the defendant's punishable misconduct" and that would have barred the jury from "punish[ing] the defendant for the impact of its alleged misconduct on other persons." *Id.* at 17a.

SUMMARY OF ARGUMENT

1. The Oregon Supreme Court's ruling that the reprehensibility factor can "override" the ratio guidepost's proportionality requirement contradicts *State Farm* and *Gore*. This approach would deprive the due process guideposts of any real meaning in many product liability cases, including cases like this one, where the plaintiff has advanced a novel fraud-based cause of action as the basis for punitive damages.

Product liability cases have common features, and pose special dangers, that require especially rigorous application of the ratio guidepost. These cases are a modern development that did not exist when the Fourteenth Amendment was ratified. They often present tragic factual circumstances involving death or serious injury, and the risks that juror passion or prejudice or sympathy will result in an unwarranted

or arbitrary punishment against a manufacturer are particularly high. The compensatory damages are often quite substantial, and include significant non-economic damage components.

Moreover, because the products are mass produced, plaintiffs' attorneys almost always argue, as in this case, that the jury should use its verdict to protect, and vindicate the rights of, other consumers who are not before the court. And jurors are often encouraged to impose punitive damages for the purpose of regulating public safety.

This Court's previous decisions analyzing due process challenges to punitive damages were rendered in the commercial sphere and thus the Court has not delineated in any detail the factors that should be considered in analyzing reprehensibility in the personal injury context. To date, most courts have taken a very superficial approach, based on a highly deferential standard of review and the jury's findings of "malice." They simply note that the company "knew" its product posed unreasonable risks of harm and that physical injury resulted, making the conduct highly reprehensible. But this approach ignores the fact that virtually *all* products pose risks that persons will be injured or killed when using the products and provides no meaningful protection against unconstitutional punishments.

For all of these reasons, the Court should reject the Oregon Supreme Court's holding that the reprehensibility factor can override the ratio guidepost and confirm that where, as here, the compensatory damages are substantial and contain a component for emotional distress, a ratio of 1:1 or lower often will be required.

2. The Oregon Supreme Court further erred in refusing to instruct the jury that it could not punish Philip Morris for harm to nonparties—and that any award of punitive damages must be reasonably related to the compensatory damage award. This Court has long held that proper jury instructions are necessary to ensure that verdicts are consistent with constitutional limits on state authority. In its punitive damages

jurisprudence, the Court has condemned vague instructions and emphasized that jury instructions are a critical bulwark against arbitrary and excessive awards.

The refusal to give a "harm to nonparties" instruction violates *State Farm* and can transform a case into a pseudo-class action, in that it enables a single plaintiff to obtain what amounts to classwide relief—without having to satisfy the procedural requirements of a legitimate class action. Particularly in a products case, where plaintiffs often exhort the jury to vindicate the rights of *all* users of a mass-marketed product, such an instruction helps ensure that the resulting award stays within constitutional limits.

A "reasonable relationship" instruction is warranted as well. The principle of proportionality—that a civil sanction must be reasonable and proportionate to the harm committed by the defendant—has a long pedigree in American constitutional and common law. An instruction that focuses the jury on the need for a reasonable relationship between the punitive damage award and the harm to the plaintiff helps guide the jury in assessing the proper amount of a punitive sanction, and reduces the likelihood of an arbitrary punishment.

ARGUMENT

I. PRODUCT LIABILITY CASES POSE SPECIAL DANGERS OF ARBITRARY PUNITIVE DAMAGE AWARDS THAT REQUIRE RIGOROUS APPLICATION OF THE RATIO GUIDEPOST

This Court has repeatedly recognized that "punitive damages pose an acute danger of arbitrary deprivation of property," and "it is well established that there are procedural and substantive constitutional limitations on these awards." *State Farm*, 538 U.S. at 416-17 (quotation marks omitted). *State Farm* and *Gore* held that the due process analysis should be conducted by reference to three guideposts: the reprehensibility of the defendant's conduct; the ratio between punitive and actual or potential damages; and the difference

between the award and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418. "The[se] principles . . . must be implemented with care, to ensure both reasonableness and proportionality." *Id.* at 428.

The Oregon Supreme Court's holding that the reprehensibility guidepost can "override" the ratio guidepost is wrong and would drain the due process guideposts of any constraining force in many product liability cases. Indeed, product cases bear special characteristics and pose special dangers that call for rigorous application of the ratio guidepost to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426.

1. Product liability claims were not known at common law and at the time of the ratification of the Fourteenth Amendment. Mass-marketed products are a modern development, and the modern product liability doctrine was not recognized until the second half of the twentieth century. *See Greenman v. Yuba Power Prods.*, 377 P.2d 897 (1963).

In the physical injury context, punitive damages at common law were reserved for cases involving intentional violence. *Cf. Gore*, 517 U.S. at 575 n.24 (quoting *Blanchard v. Morris*, 15 Ill. 35, 36 (1853) ("'We cannot say [the exemplary damages] are excessive under the circumstances; for the proofs show that threats, violence, and imprisonment, were accompanied by mental fear, torture, and agony of mind'")). But the modern law of product liability focuses not on the mental state of the defendant but on a retrospective balancing of societal risks and benefits and the spreading of losses; the infliction of *any* punishment through the tort system was questioned early on by one of the judicial architects of this product liability doctrine. *See Seffert v. L.A. Transit Lines*, 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting) ("Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged. . . . They become increasingly anomalous as emphasis shifts in a mechanized society from

ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation."). And the novel "fraud" claim advanced by respondent here as the basis for punitive damages—attacking statements of a manufacturer defending its product in litigation and other public fora—is "new," as the trial court itself recognized. 14B Tr. 109 (characterizing the claim as "something new" and noting that "we haven't seen this particular approach to a fraud claim in Oregon law. And it's a tough one.").

In short, this practice—which allows juries to inflict unlimited punishments against product makers for their mass marketing of a lawful product—was unknown at common law and is a departure from the traditional uses of the civil justice system at the time the Fourteenth Amendment was ratified. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61-62 (1991) (O'Connor, J., dissenting) (citing "the advent of product liability" as a reason for the "[r]ecent . . . explosion in the frequency and size of punitive damages awards"). This fact should inform any due process analysis of the punishment in this case and product liability cases more generally. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (noting that the Court has "stated from its first due process cases, [that] traditional practice provides a touchstone for constitutional analysis"); *id.* at 436 (Scalia, J., concurring) (concluding that by eliminating protections "traditionally accorded at common law," Oregon "violate[d] the Due Process Clause").

2. Cases alleging that a defective product injured a consumer pose heightened risks of arbitrary and excessive punitive damage awards, including where, as here, the punitive damage claim is pegged to a new brand of fraud claim. Such cases often involve tragic personal injuries likely to provoke passion, prejudice and sympathy, and jurors are asked to make an evaluation—in hindsight and on the basis of arcane expert testimony and a complex factual record—as to whether a product design posed an "unreasonable" risk.

As Judge Easterbrook explained in a products case involving an alleged design defect in the emergency stop button on an escalator:

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. . . . [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states.

Carroll v. Otis Elevator Co., 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted). As Justice Breyer has noted, our tort system "leaves the determination of 'too much risk' in the hands of tens of thousands of different juries who are forced to answer the question not in terms of a statistical life, but in reference to a very real victim needing compensation in the courtroom before them," resulting in "a system much criticized for its random, lottery-like results." Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 59 (1992).

Moreover, as exemplified by the novel fraud claim asserted by respondent, theories of liability are constantly evolving. This evolutionary process can result—as it did here—in the imposition of punitive damages based on new causes of action that did not exist at the time of the conduct being punished. *See, e.g.*, *Flax v. DaimlerChrysler Corp.*, No. 02C-1288 (Tenn. Cir. Ct. 2005) (jury awarded punitive damages on the basis of a post-sale failure-to-warn theory never before recognized under Tennessee law). This feature of product liability law not only bears on reprehensibility but also calls into question whether, as a matter of due process, any punitive damages at all can be imposed. *See State Farm*, 538 U.S. at 417 ("'[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment'" (quoting *Gore*, 517 U.S. at 574)); *Landgraf v.*

USI Film Prods., 511 U.S. 244, 281 (1994) ("Retroactive imposition of punitive damages would raise a serious constitutional question."). Notwithstanding these constitutional concerns, courts have permitted juries to impose huge punishments in such cases.

Furthermore, "[j]ury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *State Farm*, 538 U.S. at 417 (quoting *Oberg*, 512 U.S. at 432). As a result, juries sometimes impose massive punitive damage verdicts where there is legally insufficient evidence to impose any punitive damages at all. *See, e.g.*, *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439 (4th Cir. 2001) (reversing $250 million punitive damage award in a design defect case based on insufficiency of evidence).

3. Justice Breyer explained in his concurrence in *Gore* that some courts "make 'reprehensibility' a concept without constraining force." 517 U.S. at 590. And "[w]ithout objective criteria on which to rely, almost any decision regarding proportionality will be a matter of personal preference." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 480-81 (1993) (O'Connor, J., dissenting) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)) (quotation marks omitted); *see also Adams v. Murakami*, 813 P.2d 1348, 1352 (Cal. 1991) ("The determination of whether an award is excessive is admittedly more art than science. The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences.") (quotation marks omitted). These observations are especially true in product liability cases.

Indeed, many courts in product cases ignore all objective criteria in judging reprehensibility, instead focusing solely on the fact the jury found malice and that serious injury resulted. *See* Pet. App. 23a-24a (emphasizing that "[t]he harm to Wil-

liams was physical" and that this fact helps support "a very significant punitive damage award"); *Buell-Wilson v. Ford Motor Co.*, 2006 WL 2002858, at *30 (Cal. Ct. App. July 19, 2006) (concluding that Ford acted reprehensibly in part because "[t]he evidence . . . supports a finding that Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management," and upholding $55 million in punitive damages—plus an additional $23 million in non-economic damages—based on an alleged design defect in a vehicle, even though the vehicle fully complied with all federal safety standards and even though the verdict had been preceded by 13 consecutive defense verdicts in other cases alleging the same defect).[2]

But this approach ignores that thousands of injuries are caused annually by pillows, books, crayons, nails and electric Christmas decorations, among other common household products. *See* Jane Spencer & Cynthia Crossen, *Why Do Americans Believe Danger Lurks Everywhere? How a Fixation on Risk, Fed by Labs, Law and Media, Haunts World's Safest Nation*, Wall St. J., Apr. 24, 2003, at A1; Breyer, *supra*, at 3 ("We regulate only some, not all, of the risk that fills the world. Any one of us might be harmed by almost anything—a rotten apple, a broken sidewalk, an untied shoelace, a splash of grapefruit juice, a dishonest lawyer."). Even manufacturers of *toothpicks* "know" that people will be fatally injured when using their products. *See Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991) ("over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*"). Thus, the fact that a product—including a tobacco product—has some harmful effects

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[2] *But see Clark v. Chrysler Corp.*, 436 F.3d 594, 603 (6th Cir. 2006) (reducing $3 million punitive damage award to $470,000 in wrongful death case, and concluding that "because there is a good-faith dispute over whether [the] testing [advocated by plaintiff's expert] is necessary, . . . Chrysler's conduct does not evince a level of indifference to or reckless disregard for the safety of others" sufficient to justify a $3 million verdict).

does not necessarily mean that it is unreasonably dangerous. *See* Restatement (Second) of Torts § 402A cmt. i (1965) ("[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful").

Unlike traditional cases involving punitive damage claims at common law, modern product liability cases do not involve intentional efforts by the defendant to inflict injury on the plaintiff. For example, in a product case, there is often no dispute that the manufacturer knew the facts upon which the plaintiff's experts base their conclusion that the product is defective. The real dispute is one of policy rather than facts, *e.g.*, whether the undisputed facts render the product unreasonably dangerous, whether the tests recommended by the plaintiffs are a proper way to evaluate the risks, or whether the utility of the challenged design outweighs the risk. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 37 (1982) ("The very notion of how much design safety is enough"—and which design strikes the proper balance among competing interests—is often complex and rests upon a "morass of conceptual, political and practical issues on which juries, courts, commentators and legislatures strongly disagree.").

As a result of the very nature of product liability claims, once a jury concludes from the facts that the product was unreasonably dangerous, it is all too easy for a plaintiff to persuade a jury to take the next step and find that the manufacturer—simply by virtue of the fact that it knew that injuries would occur and that the product might have been designed differently to prevent some of those injuries—also "knew" that the product was unreasonably dangerous and thus acted with malice or "fraud" sufficient to support an award of punitive damages. And once such findings are made, courts defer to them and then often automatically deem the conduct "highly reprehensible."

In this regard, the Oregon Supreme Court's decision to "construe all facts in favor of plaintiff, the party in whose

favor the jury ruled" for purposes of reviewing punitive damages, Pet. App. 23a, is particularly troubling but all too familiar. *See* Pet. for Cert. at 22-28. While the Court did not grant review on this question, the extraordinarily deferential standard of review applied below is another reason to reject any approach that authorizes using the reprehensibility analysis to trump the ratio guidepost. This standard of review permits a court, as the Oregon court did here, to defer to the plaintiff's version of events, deem the defendant to have engaged in "highly reprehensible" conduct based on that skewed depiction and phantom findings that the jury never actually made, and then declare the ratio guidepost inapplicable. Other courts use a similar standard of review. *See, e.g.*, *Buell-Wilson*, 2006 WL 2002858, at *4 ("disregarding contrary evidence submitted by" the defendant, even where uncontroverted).

A regulatory agency that set public policy on the basis of such a distorted view of reality would correctly be seen to be acting irresponsibly. But courts like the Oregon Supreme Court assume that it is perfectly acceptable to make public policy based on just such a view of the evidence. If this is nevertheless an appropriate way for an appellate court to view the evidence, the potential for serious error as a result cuts strongly against any due process rule that allows the reprehensibility analysis to override the ratio guidepost.

4. Many products, including tobacco, are subject to intense government regulation and scrutiny. *See Medtronic Inc. v. Lohr*, 518 U.S. 470, 489 n.9 (1996) (noting congressional finding that government-mandated warnings on cigarette packages are "sufficient" to alert the public to the risks of smoking). Yet plaintiffs' lawyers often ask juries to act as a "super-regulator" and to impose huge punishments to cause the company to change its behavior, to protect the rights of consumers not before the court, and to counteract what the plaintiff's lawyer will claim is inadequate government regulation and enforcement. Although this Court condemned this

practice in *State Farm*,[3] it has continued, as the decision below and other recent rulings demonstrate. *See* Pet. App. 17a-21a; *Buell-Wilson*, 2006 WL 2002858, at *24 ("[P]unitive damages are permitted in product liability actions precisely because '[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles.'") (citation omitted). This type of argument necessarily distracts the jury's attention away from the conduct at issue and the actual harm to the plaintiff—key factors identified in *State Farm*—and the practice of permitting such arguments is an additional reason for enforcing, not overriding, the ratio guidepost in product liability cases.

5. Finally, product liability cases often produce very substantial compensatory damage verdicts, including large non-economic damage awards for pain and suffering and emotional distress.[4] *See, e.g., Buell-Wilson*, 2006 WL 2002858, at *24 (affirming $23 million non-economic dam-

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[3] In *State Farm*, the Court condemned the plaintiffs' effort to persuade the jury to act as a national insurance regulator by imposing a large punitive award. Counsel had argued to the jury that "[y]ou're going to hear evidence that even the insurance commission in Utah and around the country are unwilling or inept at protecting people against abuses," and that "you, here, are going to be evaluating and assessing, and hopefully requiring [the defendant] to stand accountable for what it's doing across the country." 538 U.S. at 420 (quotations omitted); *see also* Breyer, *supra*, at 59 ("Whatever its merits and problems, I do not believe the tort system can serve as a substitute for government regulation.").

[4] As Judge Niemeyer has recognized, non-economic damages are now plagued by the same problems as punitive damages, such as inadequate guidance to juries, which leads to radically varying and arbitrary awards. *See* Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1417 (2004) ("without rational criteria or defined limits, the pain and suffering award becomes the same arbitrary deprivation of property as were punitive damage awards before" *State Farm* and *Gore*).

age award (reduced from $118 million verdict), plus $55 million punitive award (reduced from $246 million)); Alex Berenson, *For Merck, Vioxx Paper Trail Won't Go Away*, N.Y. Times, Aug. 21, 2005, at 1 (Texas jury assessed $24 million in compensatory damages and $229 million in punitive damages against Merck based upon a death allegedly caused by the drug Vioxx); *Sandoz Pharms. Corp. v. Gunderson*, 2005 WL 2694816 (Ky. Ct. App. 2005) (Kentucky jury assessed $7.8 million in compensatory damages and $11.25 million in punitive damages against a drug manufacturer); *see also Interstate Southwest Ltd. v. Avco Corp.*, No. 29,385 (Tex. Dist. Ct. 2005), *appeal pending* (trial court approved jury verdict imposing $86.4 million in punitive damages and $1.7 million consisting of alleged increase in insurance premiums in case involving commercial dispute over cause of a defect in crankshafts used in propeller-driven aircraft engines manufactured by the defendant).

This too militates strongly in favor of meticulous application of the ratio guidepost in product cases, even where a court finds high reprehensibility, as such large compensatory awards serve a deterrent and even punitive function and reduce the need for a high ratio. *State Farm*, 538 U.S. at 426 ("The compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the [plaintiffs] suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.").

Indeed, as the Court held in *State Farm*, where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. For all of the reasons discussed above, this observation carries special force in the product liability context, and it cannot be swept aside by a court based on a subjective finding, construing all facts in favor of the plaintiff, that the conduct at issue was highly reprehensible.

II. DUE PROCESS REQUIRES THAT JURORS BE INSTRUCTED THAT PUNITIVE DAMAGES MUST BEAR A REASONABLE RELATIONSHIP TO THE PLAINTIFF'S HARM AND CANNOT BE BASED ON ALLEGED HARM TO THIRD PARTIES

As mentioned above, plaintiffs in product cases often exhort the jury to punish the defendant for harming individuals other than the plaintiff by widely marketing their products to consumers. Sometimes this argument is framed as a demand for "disgorgement," *i.e.*, that the amount of punitive damages should be sufficient to force the defendant to relinquish all the profit it made from the product in question—which, in the case of a mass-marketed product, is usually a substantial amount. And sometimes the argument is presented as it was here, as a demand that the jury punish the defendant for its conduct as to *all* consumers in the State.

The Oregon Supreme Court erred in refusing to instruct the jury that punitive damages must bear a reasonable relationship to the plaintiff's harm and that it could not punish Philip Morris for conduct that harmed persons other than the plaintiff. This Court should hold that this instruction was required as a matter of federal constitutional law, just as it held in *State Farm* that juries must be instructed on the constitutionally-imposed *territorial* limitations on punitive damage awards. *See* 538 U.S. at 422 ("[a] jury *must* be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred") (emphasis added).

1. In both criminal and civil cases, this Court has held repeatedly that proper instructions are crucial procedural protections that ensure that jury verdicts are consistent with constitutional limits on state authority. In *Taylor v. Kentucky*, 436 U.S. 478 (1978), for example, this Court held that a state court had erred in not instructing the jury on the presumption of innocence, a constitutional safeguard required by due process. In rejecting the argument that no instruction was

required because counsel had argued the point, this Court explained that "[i]t was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably." *Id.* at 489; *see also Carter v. Kentucky*, 450 U.S. 288, 304 (1981) ("[M]ost certainly, defense counsel's own argument . . . cannot have had the . . . effect that an instruction from the judge would have had.").

Similarly, in *Cabana v. Bullock*, 474 U.S. 376 (1986), this Court held that "a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof." *Id.* at 384. Indeed, as demonstrated by a long list of capital punishment cases, this Court has consistently required that jury instructions clearly reflect the limitations that the Constitution places on jury discretion. *See, e.g., Simmons v. South Carolina*, 512 U.S. 154, 163-64 (1994) (plurality op. of Blackmun, J.) (where a State makes "future dangerousness" relevant to capital sentencing, due process requires that the jury be informed that a life sentence would render defendant ineligible for parole).

This Court has followed a similar course in civil cases. In *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), for example, this Court found fault in a trial court's instruction to the jury on the issue of whether information on a political candidate's criminal past was "relevant" because the flawed jury instruction "left the jury far more leeway to act as censors than is consistent with the protection of the First and Fourteenth Amendments." *Id.* at 275; *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991) ("[T]he term [actual malice] can confuse as well as enlighten. . . . In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.").

The same need to confine jury discretion within appropriate limits requires that juries be instructed on governing constitutional principles in punitive damages cases. "Vague

instructions . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *State Farm*, 538 U.S. at 418. As this Court has emphasized, jury instructions are "a well-established and, of course, important check against excessive awards." *Oberg*, 512 U.S. at 433; *see also Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in judgment) (noting that a court's failure to give the jury proper standards for imposing punitive damages "appears inconsistent with due process"). Proper jury instructions will also help eliminate the need for appellate courts to review for excessiveness.

2. The Oregon Supreme Court held that the trial court properly denied Philip Morris's request for an instruction that the jury could "not punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims." Pet. App. 17a-18a. The Oregon Supreme Court held that this instruction did not "correctly state federal due process law," asserting that Philip Morris *could* be punished for harm to nonparties so long as "those other persons were Oregonians who were harmed by the same conduct that had harmed Williams." *Id.* at 20a-21a.

This was error. In *State Farm*, this Court squarely rejected the argument that an individual plaintiff may seek to base a punitive damage award on alleged injuries to third parties not before the court: "A defendant should be punished for the conduct that harmed *the plaintiff*, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423 (emphasis added). The Court emphasized that "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct [because] in the usual case nonparties are not bound by the judgment

some other plaintiff obtains." *Id.* (citing *Gore*, 517 U.S. at 593 (Breyer, J., concurring)).

This case vividly illustrates these concerns. At trial, respondent failed to put on any specific evidence to show that any particular person (other than Williams) continued smoking because of the alleged fraud. Yet despite this evidentiary void, respondent's counsel urged the jury to assume that ten out of every hundred smokers in Oregon would get cancer—and that three or four of those ten would be Marlboro smokers—and then exhorted the jury to use its punitive damage award to punish Philip Morris for the harm caused to these thousands (or more) of unidentified Oregon residents over the span of forty years.

Imposing punitive damages on this basis creates a grave risk of excessive, duplicative punishment for the same conduct. Indeed, because this was not a class action, nothing would prevent each of the thousands of unidentified Oregonians whose rights respondent purported to vindicate from filing his or her *own* individual action against Philip Morris and advancing the same (unproven) assertions of widespread harm that were advanced in this case. And nothing would prevent each individual plaintiff from recovering the same $79.5 million award of punitive damages that respondent received here. Due process forbids such an unfair result. *See W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) (a property owner "is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in . . . another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment"); *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1873) (noting "the maxim" in civil cases "that no man shall be twice vexed for one and the same cause").

Other courts around the country have condemned this approach. For example, in *Johnson v. Ford Motor Co.*, 113 P.3d 82 (Cal. 2005), the plaintiffs—purchasers of a used car—brought an individual fraud action challenging Ford's corporate resale policy. *Id.* at 85. Although the plaintiffs

suffered less than $18,000 in harm, they persuaded the jury to punish Ford by "disgorging" the $10,000,000 in profits that Ford supposedly earned from "a thousand or more" similar transactions with other California consumers over a two-year period. *Id.* at 95. No individualized proof was presented, however, that any other consumer *actually* suffered harm from Ford's policy. *Id.* at 96.

The California Supreme Court emphatically rejected the notion that a jury may award punitive damages in an individual action to punish the defendant for its conduct toward third parties. It explained that punishing a defendant in this manner would "'create[] the possibility of multiple punitive damages awards for the same conduct,'" and thus "create[] possibilities for unfairness—to the defendant and other possible claimants both—which may be of constitutional dimension." *Id.* at 94 (quoting *State Farm*, 538 U.S. at 423). The court also recognized that assessing punitive damages in this manner would impose on a defendant all of the burdens, but none of the benefits and procedural protections, of a class action. It noted that, in a true class action, "once the issues common to the class have been tried, and assuming some individual issues remain, each plaintiff must still by some means prove up his or her claim, allowing the defendant an opportunity to contest each individual claim on any ground not resolved in the trial of common issues." *Id.* at 95. By contrast, the court explained, the plaintiffs' approach would permit an individual plaintiff to seek "a large punitive damages award on profits earned from transactions with a large class of similar claimants, but . . . without ever proving the specifics of those 'hypothetical claims.'" *Id.* (quoting *State Farm*, 538 U.S. at 423). Such an award would encompass gains "not necessarily related" to the individual plaintiff's harm, and would "therefore [be] likely to be disproportionate to the individual plaintiff's compensatory award." *Id.*

The Eighth Circuit applied the same logic in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004), where it explained that awarding punitive damages to the non-class-action plaintiff for ConAgra's "similar conduct" toward other

employees would unfairly expose ConAgra to the threat of duplicative punishment:

> Where there has been a pattern of illegal conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants. Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff, however, deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.

Id. at 797. Because the judgment in such a pseudo-class action is not binding on anyone other than the individual plaintiff, it takes only one award of punitive damages to wipe out prior and subsequent victories. The California Supreme Court characterized this as the "problem of 'successive prosecution' in which a defendant that loses a single case would also lose the benefit of all previous victories against the same claim of misconduct." *Johnson*, 113 P.3d at 94-95.

This concern is not merely hypothetical. By purporting to elevate the single jury verdict here as the sole arbiter of the relative merits of Philip Morris's conduct with respect to thousands of third parties, the Oregon Supreme Court's approach would allow this verdict to erase and nullify the many verdicts that have already been returned *in favor* of Philip Morris relating to the same conduct.

The Oregon Supreme Court's approach also places on defendants the unfair burden of defending not only against the underlying cause of action, but also against allegations that thousands of individuals not before the court were subjected to—and harmed by—the same conduct. In practical terms, it is nearly impossible to mount such a defense, as addressing each claim would consume enormous resources and "unacceptably fragment[] the proceeding into an endless series of 'mini-trials,' distracting the jury from the primary focus of the dispute." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for*

Individual, Private Wrongs, 87 Minn. L. Rev. 583, 654 (2003).

Indeed, certification is often denied in *actual* class actions for this very reason. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). It is anomalous, to say the least, that the respondent in this case—by choosing to file an *individual* action in the first instance, and thus avoiding the onerous burdens of class certification and proving individualized harm that arose in *Castano* and other cases—was thereby effectively permitted to seek punitive damages on behalf of a class of thousands.

3. The Oregon Supreme Court compounded its error by holding that the trial court properly denied the other portion of Philip Morris's requested instruction: that "[t]he size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct." Pet. App. 17a.

This was undeniably a correct statement of law. *See State Farm*, 538 U.S. at 426; *Gore*, 517 U.S. at 581. Indeed, the Fourth Circuit has held that this instruction must be given when a jury is considering punitive damages under Virginia or South Carolina law. *See Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1415, 1418 (4th Cir. 1992) (en banc) (holding Virginia's punitive damage charge unconstitutional because the jury was not required to be instructed that punitive damages must be proportional to compensatory damages); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-10 (4th Cir. 1991) (jury imposing punitive damages under South Carolina law must be instructed that "any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused").

Such an instruction is an important procedural protection that helps cabin jury discretion and reduces the likelihood of the jury returning an arbitrary and unconstitutional punishment. *See Haslip*, 499 U.S. at 18 (warning that "unlimited jury discretion . . . in the fixing of punitive damages may in-

vite extreme results that jar one's constitutional sensibilities") (citation omitted).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300

THEODORE B. OLSON
Counsel of Record
THOMAS H. DUPREE, JR.
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

THEODORE J. BOUTROUS, JR.
DOMINIC LANZA
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Counsel for Amicus Curiae

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ADDENDUM

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL

3M
A.O. Smith Corporation
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
The Dow Chemical Company
E & J Gallo Winery

E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Magna International Inc.
Masco Corporation

Mazda (North America), Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)

Terex Corporation
Textron, Inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
Tyson Foods, Inc.
Vermeer Manufacturing Company
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

643

Supreme Court, U.S.
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JUL 28 2006

No. 05-1256

IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Oregon Supreme Court

BRIEF FOR *AMICI CURIAE* R.J. REYNOLDS TOBACCO COMPANY AND LORILLARD TOBACCO COMPANY IN SUPPORT OF PETITIONER

JAMES T. NEWSOM
SHOOK, HARDY & BACON LLP
2555 Grand Blvd.
Kansas City, MO 64108
(816) 474-6550

Counsel for Amicus Curiae Lorillard Tobacco Co.

MEIR FEDER
(Counsel of Record)
CHARLES R.A. MORSE
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Amicus Curiae R.J. Reynolds Tobacco Co.

Additional Counsel Listed on Inside Cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

DONALD B. AYER
ROBERT H. KLONOFF
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Additional Counsel for
Amicus Curiae R.J. Reynolds
Tobacco Co.

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Michael E. DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 Seton Hall L. Rev. 563 (2001) 12

STATEMENT OF INTEREST[1]

R.J. Reynolds Tobacco Company and Lorillard Tobacco Company manufacture and sell cigarettes. Reynolds, which now includes the U.S. cigarette and tobacco business of the former Brown & Williamson Tobacco Corporation, is the second-largest tobacco company in the United States. Its brands account for approximately 33% of U.S. cigarette sales. Lorillard is the third-largest tobacco company in the country. Its brands account for approximately 9% of U.S. cigarette sales.

Reynolds and Lorillard face a large volume of tobacco-related personal injury litigation, and as a result are regularly at risk of suffering large punitive damages awards based on claims closely resembling the claims at issue in this case. In addition, Reynolds and Lorillard, as repeat players in high-stakes tort litigation, are at risk of being punished repeatedly (and excessively) for one and the same course of conduct. For that reason, they have an interest in seeing that the constitutional limits on the size of punitive awards are not undermined, and that juries in a single case not be permitted to punish a defendant broadly for conduct affecting other alleged victims.

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[1] No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission. Both parties have consented to the filing of briefs *amicus curiae* in this case. Letters of consent are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

I. The reprehensibility of a defendant's conduct is an important guidepost by which to judge punitive damages, but only if it guides the jury's or court's discretion in settling on an amount *within* the boundaries established by other, more objective guideposts (most notably the proportionality or "ratio" guidepost). If, however, a court is allowed to *override* the other guideposts upon finding that the defendant's conduct is unusually or "extraordinarily reprehensible"—as happened in this case (Pet. App. 23a, 33a)—then the guideposts cease to constrain a jury's or court's discretion and thus cease to protect against arbitrary behavior.

The experience of Petitioner and *amici* shows just how standardless the notion of extraordinary reprehensibility is. The very same behavior that the Oregon Supreme Court found to be so thoroughly reprehensible as to justify overriding this Court's limits on punitive damages—namely, an alleged fraudulent scheme to obscure the link between smoking and disease—has been found in the great majority of similar cases not even to give rise to liability, let alone punitive damages. A number of courts have gone so far as to rule as a matter of law that cigarette manufacturers could not possibly have defrauded smokers because the link between smoking and disease has long been "common knowledge."

The Oregon Supreme Court's notion that a finding of extraordinary reprehensibility alone can justify overriding normal constitutional limitations is also flawed in that it completely ignores the need—or lack of need—for deterrence: in the present case, it allowed that court to overlook the many existing impediments to future repetition of the alleged misconduct, including: (1) a settlement agreement with the States that requires Petitioner and *amici* to pay hundreds of billions of dollars in perpetuity and gives State attorneys general the power to enforce a variety of prohibitions; (2) required warning labels for all cigarette

packages and advertisements; (3) strict oversight by the FTC; and (4) cigarette manufacturers' public statements recognizing that smoking causes disease and is addictive. This highlights a serious problem with the Oregon Supreme Court's approach, given that deterrence of future misconduct is one of the two legitimate purposes that punitive damages serve.

II. By permitting a jury in an individual tort case to award punitive damages to punish a defendant for all the harm it has allegedly caused within the State, Oregon violates procedural due process. This "statewide" approach to punitive damages effectively guarantees two types of error. First, by allowing multiple juries each to punish a defendant for an entire statewide course of conduct, that approach creates a system skewed toward duplicative and excessive total punishment. Second, since a defendant almost always will have a good defense to at least some plaintiffs' claims, an award that punishes the defendant for every harm allegedly inflicted on every resident of the State is bound to end up punishing the defendant for conduct that is found not to be culpable.

Nor does historical practice ratify statewide or multiple punishment. The threat of multiple punishment is overwhelmingly the product of mass tort litigation, which is a relatively recent phenomenon. To the extent common law courts ever had occasion to consider multiple punishment—as they occasionally did in lawsuits for the torts of seduction and breach of contract to marry—the consensus was that punitive damages should be confined to punishing the defendant for the harm to the particular plaintiff.

ARGUMENT

Respondent is the widow of Jesse Williams, who began smoking Marlboro cigarettes in the 1950s. She sued Petitioner (the manufacturer of Marlboros) after her husband died of lung cancer in 1997. Among other things, she brought a claim for fraud and alleged "a massive, continuous, near-half-century scheme to defraud" Mr. Williams "and many others." Pet. App. 33a. Her attorney repeatedly claimed that cigarette smoking was responsible for hundreds of thousands of deaths in the United States each year. *See* Transcript, Vol. 9-B, at 138, *Williams v. Philip Morris Inc.*, No. 9705-03957 (Or. Cir. Ct.); *id.* Vol. 11-B, at 41; *id.* Vol. 17-A, at 138. In his closing argument, he performed a rough calculation intended to show that Marlboro cigarettes were responsible for more than 30% of all fatal smoking-related lung cancers in Oregon, and suggested to the jury that "[w]hen you determine the amount of money to award in punitive damages against Philip Morris . . . [i]t's fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been." *Id.* Vol. 24-C, at 97; *id.* Vol. 23-B, at 91.

The jury found for Respondent on her fraud claim and awarded $821,485 in compensatory damages (later reduced to $521,485) and $79.5 million in punitive damages. After a lengthy series of proceedings that included a remand by this Court, the Oregon Supreme Court affirmed the full punitive damages award, despite this Court's admonition that punitive damages exceeding a "single-digit ratio" to compensatory damages will rarely pass constitutional muster. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). The lower court reasoned that it could overstep the usual constitutional limits because, in the court's view (no specific jury finding was made on the issue) Petitioner's conduct was "extraordinarily reprehensible." Pet. App. 23a, 33a. The court also rejected Petitioner's argument that the jury should have been required to punish only for harm to Mr. Williams

(rather than harm to all Oregon Marlboro smokers), noting that "[i]t is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus." Pet. App. 18a n.3.

This brief focuses on two key points. First, this case illustrates that allowing a jury or court to ignore the usual limits on punitive damages whenever a defendant's conduct strikes it as "extraordinarily reprehensible" is so loose an approach that it would undermine the constraints recognized by this Court in cases like *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm*. Among other things, the contrast between the Oregon Supreme Court's determination and the more usual determinations of juries and judges in *favor* of cigarette manufacturers demonstrates the inherent subjectivity of any standard satisfied by a finding that conduct was "extraordinarily reprehensible." Second, the holding that a jury should be allowed to punish a defendant for harm to non-parties violates procedural due process both by exposing defendants to multiple punishment for the same conduct and by punishing them for conduct determined in other cases not to be culpable at all.

I. ALLOWING A SUBJECTIVE FINDING OF "EXTRAORDINARY REPREHENSIBILITY" TO OVERRIDE THE RATIO GUIDEPOST WOULD RENDER THAT GUIDEPOST MEANINGLESS AS A CONSTRAINT ON ARBITRARY PUNITIVE DAMAGES

This Court has repeatedly recognized constitutional limits on the size of punitive damages awards, and has identified three "guideposts" by which to judge such awards: (1) "the degree of reprehensibility" of the defendant's conduct; (2) "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award"; and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW*, 517 U.S. at 574–75. Standards like these "offer some

kind of constraint upon a jury or court's decision, and thus protection against purely arbitrary behavior." *Id.* at 588 (Breyer, J., concurring).

One of the key elements of this system of constraints—rooted both in this Court's prior cases and in history "dating back over 700 years" (*State Farm*, 538 U.S. at 425)—is the second guidepost, which imposes a presumptive upper limit on punitive damages awards of nine times compensatory damages. As this Court emphasized in *State Farm*, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* Moreover, while the single-digit limitation is not a "rigid benchmark[]," this is true only in the sense that a higher award "*may* comport with due process" in certain specified circumstances: *i.e.*, "where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Id.* (emphasis added) (quoting *BMW*, 517 U.S. at 582).[2] Indeed, "[w]hen compensatory damages are substantial, then a *lesser* ratio, perhaps only *equal* to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* (emphasis added).

As argued in detail by Petitioner, the decision below—approving punitive damages amounting to 97 times the (very substantial) compensatory award solely because the court termed Petitioner's conduct "extraordinarily reprehensible" (Pet. App. 23a, 33a)—is flatly inconsistent with *State Farm* and *BMW*.

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[2] In addition, a higher ratio "*might*" be appropriate in other specific circumstances: "where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" *Id.* (emphasis added) (quoting *BMW*, 517 U.S. at 582).

However, even if this Court's prior cases had not foreclosed the Oregon Supreme Court's approach, that approach would have to be rejected because it would render the ratio guidepost effectively optional. Allowing a massive punitive award to evade constitutional review whenever a reviewing court deems the defendant's conduct "extraordinarily reprehensible" would give courts a way to sidestep the constitutional constraints articulated in *BMW* and *State Farm* through little more than semantic manipulation. Although the "degree of reprehensibility" (517 U.S. at 575) is an important check on judicial discretion in setting the appropriate level of punitive damages *within the constraints provided by the other guideposts*, it is simply too subjective a determination to serve as a basis for *overriding* or ignoring this Court's other guideposts.

Indeed, the present case provides a perfect illustration of how "extraordinar[y] reprehensib[ility]" is in the eye of the beholder. Pet. App. 23a, 33a. As detailed below, the Oregon Supreme Court found that Petitioner's conduct was extraordinarily reprehensible despite numerous facts casting serious doubt on that characterization and on whether Petitioner's conduct justified punitive damages at all, including:

- Petitioner and other cigarette manufacturers *win* the vast majority of personal injury cases brought to trial against them, and, even when they lose, their conduct is often found not to merit punitive damages;
- Many courts have found fraud claims against cigarette manufacturers insufficient *as a matter of law* even to establish liability;
- A variety of factors, including the Master Settlement Agreement between the States and the major cigarette manufacturers and continuing federal oversight of the tobacco industry, establish that there is no risk that the conduct at

issue will be repeated in the future, and hence no conduct to deter.

In short, these factors make clear that the lower court's extraordinary reprehensibility test provides neither an objective and meaningful constraint on runaway punitive damages nor a basis for identifying those cases in which the purposes of punitive damages might justify an award that exceeds the normal constitutional ratio.

A. Petitioner's Historic Conduct Normally Does Not Even Give Rise To Liability, Let Alone Punitive Damages

As Justices O'Connor, White, and Souter noted in calling for "objective criteria" in this field—a call answered in *BMW*—"[o]ne judge's excess very well may be another's moderation." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 480–81 (1993) (O'Connor, J., dissenting).[3] Perhaps the surest sign that the Oregon Supreme Court's extraordinary reprehensibility test is inherently subjective is the fact that the majority of relevant cases have reached conclusions very different from the one reached by the Oregon Supreme Court: far from yielding large punitive damages awards, personal injury lawsuits alleging the ill effects of smoking ("smoking-and-health lawsuits") overwhelmingly end in findings of no liability or liability without punitive damages.

Since 1954, when the earliest smoking-and-health lawsuit was filed, 83 individual cases involving allegations broadly

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[3] This same passage in Justice O'Connor's *TXO* dissent argues for several of the "objective indicators" that later became the *BMW* guideposts. *See id.* at 481.

similar to Respondent's have gone to trial.[4] Defendants have prevailed in 63 of those cases (76% of the total), mostly by obtaining defense verdicts (57 cases, or 69% of the total) but occasionally as result of post-trial or appellate rulings (six cases, or 7% of the total). Plaintiffs have prevailed in 20 cases (24% of the total), although 12 of those verdicts (14% of the total) are subject to further review. Nine cases (11% of the total) have resulted in punitive damages that have not been overturned, but in only three of those cases (4% of the total) have defendants exhausted their appeals and satisfied the judgments. In other words, based on several decades' experience, defendants have won at trial or on appeal about 75% of the time and avoided punitive damages about 90% of the time. In addition, most cases against cigarette manufacturers are dismissed prior to trial. Available records show that approximately 2,500 cases filed by individual plaintiffs have been dismissed since 1954. The gulf between these results and the Oregon Supreme Court's conclusion that Petitioner's conduct was extraordinarily reprehensible shows just how subjective that court's approach is.

Further underscoring the subjectivity and unpredictability of the Oregon Supreme Court's approach is the fact that in several jurisdictions, courts have rejected claims based on essentially the same alleged conduct at issue in this case, and have done so *as a matter of law*, on the ground that the health dangers associated with smoking are common knowledge and that no rational jury could find that the plaintiffs were defrauded into believing smoking was safe. *See, e.g., Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486,

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[4] A list of these cases appears in Appendix A to this brief.

490 (5th Cir. 1999) (dismissing Texas-law fraud claim of smoker who began smoking in 1957 because tobacco has long been "known to be unsafe"); *Prado-Alvarez v. R.J. Reynolds Tobacco Co.*, 313 F. Supp. 2d 61, 77 (D.P.R. 2004) (dismissing fraud claim in part because "reliance would be unreasonable in light of ... the long-standing common knowledge of the health risks, including cancer, associated with smoking"), *aff'd*, 405 F.3d 36 (1st Cir. 2005); *White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 429 n.5 (D. Md. 2000) ("Even if plaintiffs had evidence that Mr. White relied on any misrepresentations, they could not show such reliance was reasonable, in light of the overwhelming evidence of the widespread knowledge that cigarettes were dangerous even as early as 1950.").

The fact that the same alleged conduct is found in one case to create no liability as a matter of law and in another case to require extraordinary punitive damages highlights both the need for meaningful constraints on the size of punitive damages awards and the *lack* of constraint inherent in a test that turns on whether the defendant's conduct strikes the jury or court as "extraordinarily reprehensible." A standard so irremediably dependent on the eye of the beholder is "vague and open ended to the point where [it] risk[s] arbitrary results." *BMW*, 517 U.S. at 588 (Breyer, J., concurring). If permitted to override this Court's ratio guidepost, the Oregon Supreme Court's standard would fatally undermine that guidepost as an independent constraint on punitive damages.

B. Petitioner And Other Cigarette Manufacturers Have Changed The Conduct That Forms The Basis For The Punitive Damages Award Below And Are Subject To Constant Governmental Oversight

The Oregon Supreme Court did not try to justify its extraordinary reprehensibility approach in terms of deterrence, and indeed its approach authorizes departure from this Court's ratio guidepost without regard to whether

the defendant is likely to continue engaging in the conduct at issue in the future. Given that "deterring [the] repetition" of "unlawful conduct" is one of the two "legitimate interests" that punitive damages serve (*BMW*, 517 U.S. at 568), this is a serious omission.

In short, any rational approach to justifying extraordinary punitive damages would necessarily address the need for deterrence of future misconduct, but the extraordinary reprehensibility approach does not even attempt to do so. Had this factor been taken into account, it would have been clear that there is no meaningful need for extraordinary deterrence of Petitioner or other major cigarette manufacturers.

1. The Major Cigarette Manufacturers Are Parties To Enforceable Settlement Agreements With The States That Prohibit Them From Engaging In A Broad Range Of Conduct

In 1998, 46 States, the District of Columbia, and several U.S. territories entered into the "landmark" Master Settlement Agreement ("MSA") "with major manufacturers in the cigarette industry," including Petitioner and its *amici*. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001).[5] "The signatory States settled their claims against these companies in exchange for monetary payments and permanent injunctive relief." *Id.* In particular, the companies agreed to subject themselves to constant oversight

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[5] A copy of the MSA can be found at the website of the National Association of Attorneys General: http://www.naag.org/backpages/naag/tobacco/msa.

by State attorneys general and to pay billions of dollars in perpetuity to the settling States (estimated to amount to more than $200 billion over the course of the first quarter century). In addition, the companies agreed to pay $1.45 billion for a "coordinated program of public education and study." MSA §§ VI(b), VI(c), IX(c). Separate agreements with the other four States also call for strict governmental oversight and for payments in perpetuity (amounting to approximately $40 billion over the first 25 years). These agreements likely represent the largest redistribution of wealth through litigation in world history. *See* Michael E. DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 Seton Hall L. Rev. 563, 564 (2001).

The MSA directly prohibits cigarette manufacturers from engaging in various forms of conduct. Some of these prohibitions, such as a near ban on outdoor advertising of cigarettes, could not be constitutionally imposed without cigarette manufacturers' consent. Most relevant for present purposes, the MSA prohibits any "material misrepresentation of fact regarding the health consequences of using any Tobacco Product." MSA § III(r). And it expressly prohibits suppression of information about smoking's health effects:

> No Participating Manufacturer may enter into any contract, combination or conspiracy with any other Tobacco Product Manufacturer that has the purpose or effect of: (1) limiting competition in the production or distribution of information about health hazards or other consequences of the use of their products; (2) limiting or suppressing research into smoking and health; or (3) limiting or suppressing research into the marketing or development of new products . . . .

Id. § III(q).

The MSA is enforceable in the courts of signatory States, which retain jurisdiction over enforcement actions brought by State attorneys general. *See id.* § VII(a). The MSA also provides for the National Association of Attorneys General ("NAAG") to coordinate and facilitate the MSA's implementation and enforcement by the states. *See id.* § VIII. The cigarette manufacturers themselves have placed $50 million in escrow to fund this enforcement apparatus. *See id.* § VIII(c) & Ex. J. NAAG and the State attorneys general actively monitor the signatory cigarette manufacturers' compliance with the MSA. The parties often are able to resolve concerns without having to resort to the courts, but NAAG and the States have not hesitated to pursue formal enforcement action when they deemed it appropriate. *See, e.g., State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 820 N.E.2d 910 (Ohio 2004) (holding, in context of enforcement action by Ohio attorney general, that the MSA prohibits cigarette advertising on matchbooks).

2. Federal Regulation Requires Specific Disclosures By Cigarette Companies

Federal legislation has required warning labels on cigarette packages since 1966. *See* 15 U.S.C. §§ 1331–41. The Federal Cigarette Labeling and Advertising Act ("FCLAA") of 1965 established "a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331. The FCLAA presently requires cigarette manufacturers to place one of the following four warning labels in a specific format on cigarette packages and in most related advertising:

> SURGEON GENERAL'S WARNING: SMOKING CAUSES LUNG CANCER, HEART DISEASE, EMPHYSEMA, AND MAY COMPLICATE PREGNANCY.

> SURGEON GENERAL'S WARNING: QUITTING SMOKING NOW GREATLY REDUCES SERIOUS RISKS TO YOUR HEALTH.
>
> SURGEON GENERAL'S WARNING: SMOKING BY PREGNANT WOMEN MAY RESULT IN FETAL INJURY, PREMATURE BIRTH, AND LOW BIRTH WEIGHT.
>
> SURGEON GENERAL'S WARNING: CIGARETTE SMOKE CONTAINS CARBON MONOXIDE.

The Federal Trade Commission also regulates cigarette manufacturers' speech about smoking and health. Congress created the FTC in 1914 to redress every "unfair method of competition or unfair or deceptive act or practice in or affecting commerce." 15 U.S.C. § 45(b). This extends to "regulation of unfair and deceptive tobacco advertisements." *Watson v. Philip Morris Cos.*, 420 F.3d 852, 855 (8th Cir. 2005). The FTC also has a long and continuing history of vigilance in this field:

> Since [1955], the Commission has maintained a close and continuous scrutiny of cigarette advertising practices, and has been deeply attentive to the progress of medical research into the health aspects of smoking. The Commission's staff has monitored all cigarette advertising during this period, and continues to monitor it today. Close contact has been maintained with the officials of the cigarette industry and with the public and private bodies that have been engaged in scientific research in this field.

Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8325 (July 2, 1964). In addition, "the FTC itself conducted the entire testing process [to determine the tar and nicotine content of light cigarettes] for twenty years and now requires the cigarette

manufacturers to conduct the testing to its specifications. The FTC continues to inspect the industry labs, independently verify the results, and publish the ratings." *Watson*, 420 F.3d at 858.

The FTC has not hesitated to use its authority to police cigarette manufacturers' advertising practices. For example, the Commission undertook an investigation of *amicus* Reynolds's former Joe Camel advertising campaign to determine whether it had the effect of promoting Camel brand cigarettes to children. The FTC scoured tens of thousands of Reynolds's documents, enlisted multiple experts, and conducted numerous market surveys, before concluding that the Joe Camel campaign did not lead children to smoke. *See In re R.J. Reynolds Tobacco Co.*, No. 9285, 1997 WL 281337 (FTC May 28, 1997) (attaching June 1994 joint statement of Commissioners Azcuenaga, Owen, and Starek). Subsequently, the FTC reopened and then dismissed the investigation on the ground that the MSA's prohibitions rendered the investigation moot. *See In re R.J. Reynolds Tobacco Co.*, No. 9285, 1999 WL 33912978 (FTC Jan. 4, 1999).

3. Petitioner And Its *Amici* Recognize That Cigarette Smoking Causes Disease

Petitioner and its *amici* each expressly recognize that smoking can cause various diseases, including lung cancer, and is addictive. For example, Petitioner states on its website that "Philip Morris agrees with the overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other

serious diseases in smokers."[6] Similarly, Petitioner states that it agrees "with the overwhelming medical and scientific consensus that cigarette smoking is addictive."[7]

* * * * *

In short, there is no prospect of a continuing scheme to defraud smokers by "creat[ing] in the public mind the impression that there were legitimate reasons to doubt the danger of smoking" (Pet. App. 3a, 33a)—even assuming for the sake of argument that there was such a prospect at any time in recent memory. This greatly reduces the need for punitive damages, since it removes one of the two reasons for awarding them. The failure of the Oregon Supreme Court's "extraordinary reprehensibility" approach even to take this into account makes clear that that approach—aside from its subjectivity and manipulability—provides an inadequate basis for distinguishing cases meriting extraordinary punishment from those meriting only "ordinary" levels of punishment.

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[6] Philip Morris USA, Smoking and Health Issues: Cigarette Smoking and Disease, http://www.philipmorrisusa.com/ en/ health_issues/ cigarette_smoking_and_disease.asp; *see also* Martin L. Owalsky, Chairman, Lorillard Tobacco Co., Statement on Smoking and Health Issues, http://www.lorillard.com/index.php?id=32; R.J. Reynolds Tobacco Co., Smoking and Health: Summary of Opinions, http://www.rjrt.com/smoking/summaryCover.aspx.

[7] Philip Morris USA, Smoking and Health Issues: Addiction, http://www.philipmorrisusa.com/en/health_issues/addiction.asp; *see also* Martin L. Owalsky, Chairman, Lorillard Tobacco Co., Statement on Smoking and Health Issues, http://www.lorillard.com/index.php?id=32; R.J. Reynolds Tobacco Co., Smoking and Health: Addiction and Quitting, http://www.rjrt.com/smoking/quittingCover.aspx.

II. THE OREGON SUPREME COURT'S APPROACH OF PUNISHING HARM TO ALL AFFECTED NON-PARTIES IN THE STATE IN A SINGLE INDIVIDUAL CASE VIOLATES PROCEDURAL DUE PROCESS

In the present case, Respondent's counsel urged the jury to punish Petitioner for the alleged harm to all Marlboro smokers in Oregon. After saying several times during trial that smoking kills between 300,000 and 500,000 Americans each year, and arguing in closing that one in ten smokers dies of lung cancer and 30% of Oregon smokers smoke Marlboros, he suggested to the jury that "[w]hen you determine the amount of money to award in punitive damages against Philip Morris . . . [i]t's fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been." *See supra* at 4 (citing trial transcript).

Exacerbating this appeal for statewide punishment, the trial court rejected Petitioner's request for an instruction that it should not "punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit." Pet. App. 17a–18a. The Oregon Supreme Court likewise rejected this instruction as "incorrect under state law" and "federal due process law." *Id.* at 18a, 21a. The court reasoned that if a jury can "'consider' harm to others" within the State, it must be able to punish for that harm. Pet. App. 18a & n.3.

This sort of appeal for statewide punishment is not an isolated phenomenon. To take just one recent example, Petitioner and *amici* are facing the same problem in Missouri in connection with a series of dozens of cases based on essentially the same course of conduct at issue here—an alleged multi-decade fraudulent scheme designed to obscure the link between cigarette smoking and disease. In one recent case on behalf of the survivors of a deceased smoker, the plaintiffs' lawyer asked the jury to award punitive damages based on the purported effect of

Brown & Williamson's conduct on thousands of Missouri smokers over a ten-year period, despite the fact that in a whole series of recent cases—including an earlier federal lawsuit by the smoker himself, *see Smith v. Brown & Williamson Tobacco Corp.*, No. 96-459-CV-3, 1999 U.S. Dist. LEXIS 21990 (W.D. Mo. Jan. 29, 1999)—cigarette manufacturers had prevailed:[8]

> [A]s a cost of their business, a thousand Missourians die every year. It's just part of their business. And you've already found that they're conscious of it, and they are indifferent to it. In other words, they don't care about that.
>
> Ten thousand people died during the time that [the smoker] was sick. Ten thousand people died. Their sales are $80 million a year. During the time that [the smoker] was sick, that's $800 million . . . over 10 years, over the decade, $800 million is how much that they sold in this state.

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[8] Missouri juries rejected plaintiffs' claims in their entirety in four recent smoking-and-health cases. *See Mash v. Brown & Williamson Tobacco Corp.*, No. 4:03-CV-485-TCM (E.D. Mo. Sept. 30, 2004); *Steele v. Brown & Williamson Tobacco Corp.*, No. 4:97-CV-961-ODS (W.D. Mo. May 13, 1999); *VanDenBurg v. Brown & Williamson Tobacco Corp.*, No. 03CV237238 (Mo. Cir. Ct. Feb. 22, 2006); *Welch v. Brown & Williamson Tobacco Corp.*, No. 00CV209292 (Mo. Cir. Ct. June 16, 2003). Another Missouri jury awarded modest compensatory damages in one of the cases, but rejected a claim for punitive damages. *See Thompson v. Brown & Williamson Tobacco Corp.*, No. 00CV220555 (Mo. Cir. Ct. Nov. 3, 2003), *appeal docketed*, No. WD 63897 (Mo. Ct. App. Mar. 9, 2004). Other Missouri courts have rejected similar claims as a matter of law. *See, e.g., Ross v. Philip Morris & Co.*, 328 F.2d 3, 10 (8th Cir. 1964); *Coleman v. R.J. Reynolds Tobacco Co.*, No. 4:01-CV-1698-ERW (E.D. Mo. Aug. 5, 2003).

> And their profit in just one year nationally is a billion dollars.
>
> . . .
>
> . . . I'm asking you to assess the damages at $200 million so that they will understand clearly, when they read this transcript, what you were doing; that you said we're going to take away the profit of what you did in this state for the 10 years that [the smoker] was sick.
>
> . . . [Take] away the profit from Brown & Williamson Tobacco Company because they killed 10,000 of our citizens.

Transcript on Appeal, Vol. 5, at 3318–23, *Brown & Williamson Tobacco Corp. v. Smith*, No. WD 65542 (Mo. Ct. App. June 2, 2005). The jury responded favorably to this argument—the plaintiff won a $20 million punitive award.[9]

As Petitioner argues in detail, this type of "statewide" course-of-conduct approach, which contemplates that a jury can use a single punitive damages award in an individual lawsuit to punish a defendant for the harm it has done to non-parties throughout the State, is inconsistent with *State Farm*. *See* 538 U.S. at 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts . . . to adjudicate the merits of other parties' hypothetical claims against a defendant under the guide of

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[9] Brown & Williamson has appealed this verdict. *See* Notice of Appeal, *Brown & Williamson Tobacco Corp. v. Smith*, No. WD 65542 (Mo. Ct. App. June 1, 2005).

the reprehensibility analysis . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . . .").

Amici believe it is important to recognize that even though excessive punitive damages are sometimes regarded as being contrary to principles of substantive due process, statewide punishment also violates basic principles of *procedural* due process.

A. The Oregon Supreme Court's Statewide Approach Invites Systematic Over-Punishment And Punishment Of Conduct That Does Not Give Rise To Liability

Under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), "identification of the specific dictates of due process generally requires consideration of three distinct factors," with a particular focus on "the risk of an erroneous deprivation" of a protected interest and "the probable value, if any, of additional or substitute procedural safeguards." *Id.* There is no dispute that a defendant has an interest in not being "unjustly punished," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 429 (1994), including an interest in avoiding a punitive damages award that is excessive in relation to "the State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW*, 517 U.S. at 568. A defendant also has an interest in not being punished for conduct that does not give rise to legal liability. *See id.* at 573 n.19 ("'To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.'" (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978))). Oregon's statewide approach to punitive damages creates a near-certainty that defendants will be erroneously deprived of these interests.

First, a system like Oregon's that permits juries in a single case to punish a defendant for an entire course of conduct throughout the State is all but certain to produce excessive punishment, even by the State's own measure of what

punishment is optimal. If the first jury to award punitive damages for a particular course of conduct awards the amount appropriate to achieve the State's goals of punishing and deterring the entire course of conduct, any succeeding award necessarily results in total punishment for the course of conduct that *exceeds* the appropriate amount. A system that allows successive juries to impose course-of-conduct punishment is therefore necessarily skewed toward punishing excessively. In *Mathews*' terms, such a system's "risk of error" (424 U.S. at 344) in imposing appropriate punishment approaches 100%.

To avoid this error, a State could impose a limit of one award of punitive damages for any given course of conduct.[10] But Oregon law does not offer that protection. *See infra* at 24–25. Without any effective impediment to the entry of multiple punitive damages, a statewide punishment approach is inherently biased toward excessive punishment. As Judge Friendly once noted, "[t]he legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so

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[10] A system that simply banned multiple statewide awards would still have other procedural defects, including: (a) the near-certainty that a statewide award would violate the defendant's rights by punishing it for conduct that does not give rise to liability, *see infra* at 22–24; (b) the impossibility of giving what amounts to class action treatment to allegations implicating numerous individual issues; and, relatedly, (c) the impossibility of ensuring that the defendant will not be deprived of defenses, such as lack of reliance or assumption of risk, that can be addressed only in individual cases.

administered as to avoid overkill." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

Second, the Oregon procedure irrationally permits the jury to punish the defendant even for harm to individuals to whom it may have no liability—including individuals as to whom its conduct is vindicated by another jury, or found not worthy of a punitive sanction. As the discussion in Part I.A demonstrates, there is ample precedent in lawsuits asserting claims resembling Respondent's for defense verdicts or plaintiffs' verdicts without punitive damages. But the Oregon Supreme Court's statewide approach (coupled with Respondent's counsel's argument to the jury) allowed the jury to punish Philip Morris on the assumption that *every* harm to every Oregonian who smoked Marlboro cigarettes was worthy of punishment. Thus, even one statewide punitive damages award in Oregon deprives a defendant of much of the benefit of prior and subsequent defense verdicts arising out of the same course of conduct.

The Missouri example discussed earlier provides an excellent illustration of this problem. The Missouri jury that awarded $20 million in punitive damages did so in response to counsel's express invitation to punish the defendant for harm to an estimated 10,000 Missourians who died from smoking cigarettes, despite the defendant's consistent record of *winning* or (avoiding punitive damages) in previous Missouri cases based on the same course of conduct. *See supra* at 18–20 & n.8.

This error is inherent in the very notion of statewide course-of-conduct punishment. Unless the defendant entirely lacks valid defenses, a statewide award is bound to punish conduct that does not give rise to liability. Thus, in this respect, too, the risk of error inherent in a statewide approach is overwhelmingly high.

In short, statewide course-of-conduct punishment violates due process both because it is systematically skewed toward

excessive punishment through multiple penalties for the same conduct and because it results in punishment for conduct that is not even wrongful (and often has been adjudicated to give rise to no liability). To avoid this violation of procedural due process, an instruction like the one Petitioner proposed in this case should have been given: *i.e.*, that while jurors "may consider the extent of harm suffered by others" in evaluating the harm *to the plaintiff*, they should not "punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit." Pet. App. 17a–18a.

The Oregon Supreme Court's objection to this instruction—that "[i]t is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus" (Pet. App. 18a n.3)—makes little sense in light of longstanding criminal sentencing doctrine. It has long been understood that a court may consider uncharged conduct in judging the blameworthiness *of the crime of conviction*, but may not *punish* for uncharged conduct. *See Williams v. New York*, 337 U.S. 241, 245–46, 251 (1949) (although judge could not sentence defendant for prior uncharged crimes, judge could *consider* defendant's other conduct as bearing on the appropriate punishment for the crime before the court). The same principle applies equally here: a jury may consider the defendant's broader course of conduct in determining how severely to punish the defendant for the harm to the plaintiff, but the jury may not be asked—as it was here—to *punish* the defendant for that harm to others.

B. Oregon's Limited Statutory Protections Do Not Redeem Its Supreme Court's Statewide Approach To Punishment

Oregon's limited statutory protections against excessive punishment do not obviate the constitutional problem created

by its statewide approach. Oregon has two relevant statutory provisions: One calls for the fact-finder imposing punitive damages to consider "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including . . . punitive damage awards to persons in situations similar to the claimant's." Or. Rev. Stat. § 30.925(2). The other directs reviewing courts to "consider the amount of any previous judgment for punitive damages entered against the same defendant for the same conduct giving rise to a claim for punitive damages." *Id.* § 31.730(3). Neither of these provisions purports to preclude excessive multiple punishment or punishment of lawful conduct, and there is no reason to expect Oregon courts to interpret them that way. *See Schwarz v. Philip Morris Inc.*, 135 P.3d 409, 443 n.4 (Or. Ct. App. 2006) (Armstrong, J., dissenting) (statement by four judges from nine-judge *en banc* panel that Section 31.730(3) did not require reduction of a $150 million punitive award against Petitioner in fraud lawsuit brought by the estate of Oregon smoker who died of lung cancer).[11] Indeed, Section 30.925(2) arguably exacerbates the problem by bringing to the second jury's attention the fact that an earlier jury considered defendant's conduct reprehensible enough to warrant punitive damages. In many instances, this could act as an incitement to multiple punishment rather than a check upon it.

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[11] The majority in *Schwarz* vacated the punitive damages award on other grounds and so did not reach the question whether Section 31.730(3) might require reducing or vacating the punitive award.

C. Historical Practice Does Not Validate A Statewide Approach To Punitive Damages

It is also worth emphasizing that the course-of-conduct approach to punitive damages has none of the historical pedigree that has helped to validate some traditional aspects of punitive damages practice that would otherwise be constitutionally suspect. *See, e.g.*, *TXO*, 509 U.S. at 457 (relying on historical practice); *Haslip*, 499 U.S. at 24–25 (Scalia, J., concurring) (*only* historical pedigree justifies standardlessness of typical punitive damages instructions to jury); *id.* at 40 (Kennedy, J., concurring) ("Jury determination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary."). Indeed, if any approach has an historical pedigree, it is the one championed by Petitioner and *amici* that limits punishment to the amount appropriate to the harm visited on the injured party before the court.

Until after the middle of this century, mass torts affecting hundreds or thousands of individuals were essentially unknown to the law. *See, e.g.*, *In re School Asbestos Litig.*, 789 F.2d 996, 1003 (3d Cir. 1986) ("In an era when most tort suits were 'one-against-one' contests, a single act triggered a single punishment."); *Roginsky*, 378 F.2d at 838 ("[W]hat strikes one is not merely that these torts are intentional but that usually there is but a single victim; a punitive recovery by him ends the matter.").

Common law courts thus had little occasion to address the unique issues of overkill and punishment of lawful conduct presented by a single course of conduct affecting large numbers of people. But the issue of multiple punishments arose occasionally, and when it did, courts generally took the view that an award of punitive damages should address harm to the plaintiff alone. As Professor Thomas Colby explains, "the earliest decisions to raise the specter of multiple punishment" are "those addressing the question whether, in

cases involving seduction and breach of a promise to marry, it was permissible for both the seduced woman and her father to obtain punitive damages from the seducer for the same wrongful conduct." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 623 (2003). In most cases, the answer was yes, provided the award to the woman punished only for the harm she suffered and the award to her father punished only for the harm he suffered. *See, e.g.*, *Tullidge v. Wade*, 95 Eng. Rep. 909, 910 (C.P. 1769) (Bathurst, J.) (affirming punitive damages award in favor of father but explaining that it would have been improper for the jury to have punished the defendant, in the father's suit, for harm to the daughter); *Stevenson v. Belknap*, 6 Iowa 97, 101 (1858) (holding that "if actions are brought by both the father and daughter," the jury should confine itself to awarding "damages resulting to the plaintiff alone, and not to another"); *Phelin v. Kenderdine*, 20 Pa. 354, 362 (1853) ("[T]he only instruction which the defendant has a right to require in regard to such evidence [concerning the seduction] is, that the jury must not award *to the father* any part of the damages which belong to the daughter, by reason of the breach of the contract of marriage.").

As Colby notes, the Michigan Supreme Court confronted the issue of multiple punishment squarely in a case arising under a statute authorizing "every wife, child, parent, guardian, husband, or other person" injured by an intoxicated person to recover "actual and exemplary damages" from the vendor who sold the alcohol to the intoxicated person. The court concluded that any punitive damages award given under this statute should focus exclusively on the wrong to the plaintiff:

> The foundation of exemplary damages . . . rests on the wrong done willfully to the complaining party, and not to wrong done -

> without reference to that party. Otherwise, every one entitled under the statute to bring an action might bring his or her separate action for the same wrong, and while each would recover as his own actual damages no more than his own injury, the same exemplary damages would be multiplied and recoverable in addition to actual damages in every one of those actions. No such consequence can have been intended.

Ganssly v. Perkins, 30 Mich. 492, 495 (1874).

Similarly, the few modern courts that identify any purportedly "traditional manner" of assessing punitive damages in the mass-tort context have spoken of jurors' "confining their consideration of the appropriate punishment to the injury inflicted upon the plaintiffs in [the] particular litigation." *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2d Cir. 1990); *see also King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1030 (5th Cir. 1990).

Thus, to the extent historical practice has anything relevant to say in this case, it is that punitive damages should focus on the harm to the plaintiff before the court and not the harm to absent parties.

CONCLUSION

The judgment of the Oregon Supreme Court should be reversed.

Respectfully submitted,

JAMES T. NEWSOM
SHOOK, HARDY & BACON LLP
2555 Grand Blvd.
Kansas City, MO 64108
(816) 474-6550

Counsel for Amicus Curiae Lorillard Tobacco Co.

MEIR FEDER
(Counsel of Record)
CHARLES R.A. MORSE
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

DONALD B. AYER
ROBERT H. KLONOFF
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Amicus Curiae R.J. Reynolds Tobacco Co.

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APPENDIX

APPENDIX A

DEFENSE VERDICTS (57)

Allen v. R.J. Reynolds Tobacco Co., No. 01-4319 (S.D. Fla. Feb. 28, 2003).

Anderson v. Am. Tobacco Co., No. 42821/97 (N.Y. Sup. Ct. June 27, 2000).

Apostolou v. Am. Tobacco Co., No. 34734/00 (N.Y. Sup. Ct. Jan. 16, 2001).

Beckum v. Philip Morris USA, Inc., No. 02-1836 (Fla. Cir. Ct. Apr. 29, 2005).

Carter v. Philip Morris USA, No. 00-4567 (Pa. Ct. C.P. Jan. 27, 2003).

Conley v. R.J. Reynolds Tobacco Co., No. 00-01740 (N.D. Cal. Dec. 31, 2002).

Coolidge v. Philip Morris USA, No. RIC 361063 (Cal. Super. Ct. Apr. 21, 2005).

Covert v. Lorillard Tobacco Co., No. 87-131 (M.D. La. Jan. 27, 1994).

DuJack v. Brown & Williamson Tobacco Corp., No. 07-99-728255 (Conn. Super. Ct. Nov. 13, 2001).

Eiser v. Brown & Williamson Tobacco Corp., No. 4367 (Pa. Ct. C.P. Aug. 15, 2003).

Galbraith v. R.J. Reynolds Tobacco Co., No. 144417 (Cal. Super. Ct. Dec. 23, 1985).

Gilboy v. R.J. Reynolds Tobacco Co., No. 314,002 (La. Cir. Ct. July 9, 1999).

Girton v. Am. Tobacco Co., No. 85-7180 (E.D. Pa. June 24, 1988).

Gordon v. R.J. Reynolds Tobacco Co., No. 96-1133 (Mass. Super. Ct. Sept. 26, 1997).

Green v. Am. Tobacco Co., No. 8505 (S.D. Fla. Aug. 2, 1960) (first trial).

Green v. Am. Tobacco Co., No. 8505 (S.D. Fla. Nov. 27, 1964) (second trial).

Grinnell v. Am. Tobacco Co., No. E-122,878 (Tex. Dist. Ct. Mar. 7, 2001).

Hall v. R.J. Reynolds Tobacco Co., No. 00-1061 (Fla. Cir. Ct. Dec. 10, 2003).

Hyde v. Philip Morris, Inc., No. 97-359 (D.R.I. Mar. 21, 2002).

Inzerilla v. Philip Morris USA, Inc., No. 11754/96 (N.Y. Sup. Ct. Feb. 20, 2003).

Karbiwnyk v. R.J. Reynolds Tobacco Co., No. 95-4697 (Fla. Cir. Ct. Oct. 31, 1997).

Karney v. Philip Morris, Inc., No. 89196-8 (Tenn. Cir. Ct. May 10, 1999).

Kimball v. R.J. Reynolds Tobacco Co., No. 03-664 (W.D. Wash. May 15, 2006).

Kotler v. Am. Tobacco Co., No. 86-810 (D. Mass. Mar. 7, 1990).

Kueper v. R.J. Reynolds Tobacco Co., No. 91-734 (Ill. Cir. Ct. Jan. 29, 1993 and Sept. 1, 1994).

Lartigue v. R.J. Reynolds Tobacco Co., No. 5271 (E.D. La. Oct. 11, 1960).

Little v. R.J. Reynolds Tobacco Co., No. 2:98-1879 (D.S.C. Feb. 6, 2001).

Longden v. Philip Morris USA, Inc., No. 00-442 (N.H. Super. Ct. Nov. 24, 2003).

Lucier v. Philip Morris, Inc., No. 02-1909 (Cal. Super. Ct. Feb. 7, 2003).

Martinez v. Liggett Group, Inc., No. 2002-20943 (Fla. Cir. Ct. Feb. 11, 2005).

Mash v. Brown & Williamson Tobacco Corp., No. 03-485 (E.D. Mo. Sept. 30, 2004).

McDaniel v. Brown & Williamson Tobacco Corp., No. 90832-8 (Tenn. Cir. Ct. May 10, 1999).

Mehlman v. Philip Morris, Inc., No. 1141-99 (N.J. Super. Ct. May 16, 2001).

Newcomb v. R.J. Reynolds Tobacco Co., No. 88913-8 (Tenn. Cir. Ct. May 10, 1999).

Nunnally v. R.J. Reynolds Tobacco Co., No. 92-270 (Miss. Cir. Ct. July 12, 2000).

Peters v. Brown & Williamson Tobacco Co., No. 69-2340 (N.D. Ill. July 19, 1972).

Pritchard v. Liggett & Myers Tobacco Co., No. 12820 (W.D. Pa. May 4, 1960) (first trial).

Pritchard v. Liggett & Myers Tobacco Company, No. 12820 (W.D. Pa. Nov. 9, 1962) (second trial).

Pritchard v. Liggett & Myers Tobacco Co., No. 12820 (W.D. Pa. Oct. 8, 1968) (third trial).

Raulerson v. R.J. Reynolds Tobacco Co., No. 95-1820 (Fla. Cir. Ct. May 5, 1997).

Reller v. Philip Morris, Inc., No. 261796 (Cal. Super. Ct. July 31, 2003) (first trial).

Reller v. Philip Morris, Inc., No. 261796 (Cal. Super. Ct. Mar. 4, 2005) (second trial).

Rogers v. R.J. Reynolds Tobacco Co., No. 87-2106 (Ind. Super. Ct. Aug. 23, 1996).

Rosen v. Brown & Williamson Tobacco Corp., No. 97-18589 (N.Y. Sup. Ct. June 20, 2005).

Ross v. Philip Morris Co., No. 9494 (W.D. Mo. July 10, 1962).

Roysdon v. R.J. Reynolds Tobacco Company, Case 3-84-606 (E.D. Tenn. Dec. 6, 1985).

Schwartz v. Liggett Group, Inc., No. 03-2078 (Fla. Cir. Ct. Mar. 2, 2006).

Settle v. Brown & Williamson Tobacco Corp., No. 89226-8 (Tenn. Cir. Ct. Mar. 17, 1999).

Steele v. Brown & Williamson Tobacco Corp., No. 4:97-961 (W.D. Mo. May 13, 1999).

Thayer v. Liggett & Myers Tobacco Company, No. 5314 (W.D. Mich. Dec. 12, 1969).

Tompkin v. Am. Tobacco Co., No. 5:94-1302 (N.D. Ohio Oct. 5, 2001).

Tune v. Philip Morris Inc., No. 97-4678 (Fla. Cir. Ct. May 24, 2002).

VanDenBurg v. Brown & Williamson Tobacco Corp., No. 03-237238 (Mo. Cir. Ct. Feb. 22, 2006).

Weaver v. Am. Tobacco Co., No. 456 (Mo. Cir. Ct. Apr. 3, 1970).

Welch v. Brown & Williamson Tobacco Corp., No. 00-209292 (Mo. Cir. Ct. June 17, 2003).

Wilkes v. Am. Tobacco Co. , No. 91-123-55 (Miss. Cir. Ct. June 17, 1993).

Zagurski v. Am. Tobacco Co., No. 9988 (D. Conn. June 15, 1967).

PLAINTIFF'S VERDICTS REVERSED BY A POST-TRIAL MOTION OR ON APPEAL (6)

Cipollone v. Liggett Group, Inc., No. 83-2864 (D.N.J. June 13, 1988), *rev'd*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part and rev'd in part*, 505 U.S. 504 (1992).

Engle v. R.J. Reynolds Tobacco Co., No. 94-8273 CA 22 (Fla. Cir. Ct. Apr. 7, 2000), *rev'd sub nom. Engle v. Liggett Group, Inc.*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), *aff'd in part and rev'd in part*, No. SC03-1856, 2006 WL 1843363, at *21 (Fla. July 6, 2006) (claims of plaintiff Amodeo dismissed by Florida Supreme Court as time-barred; opportunity for further appellate review has not expired).[12]

Figueroa-Cruz v. R.J. Reynolds Tobacco Co., No. 00-2334 (D.P.R. Sept. 25, 2002) (motion for judgment notwithstanding the verdict granted Oct. 11, 2002), *aff'd*, 348 F.3d 271 (1st Cir. 2003).

Jones v. R.J. Reynolds Tobacco Co., No. 97-4966 (Fla. Cir. Ct. Oct. 12, 2000) (defendant's motion for new trial granted, Dec. 28, 2000).

Whiteley v. Raybestos-Manhattan, Inc., No. 303184 (Cal. Super. Ct. Mar. 20, 2000 and Mar. 27, 2000), *rev'd and remanded*

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[12] *Engle* was tried pursuant to a multi-phase trial plan. In Phase II-A, the jury decided the claims of three individual smokers. The Florida Supreme Court, in addition to decertifying the class, reversed the verdict that awarded damages to one of the three individual smokers but affirmed the damages awarded to the other two. *See* 2006 WL 1843363, at *22.

sub nom. Whiteley v. Philip Morris Inc., 11 Cal. Rptr. 3d 807 (Cal. Ct. App. 2004).

Widdick v. Brown & Williamson Tobacco Corp., No. 97-3522 (Fla. Cir. Ct. June 10, 1998), *rev'd*, 717 So. 2d 572 (Fla. Dist. Ct. App. 1998).

PLAINTIFF'S VERDICTS (20)

Plaintiff's verdicts with punitive damages awards remitted on appeal:

Boeken v. Philip Morris Inc., No. 226593 (Cal. Super. Ct. June 6, 2001) ($3 billion), *remitted by* 26 Cal. Rptr. 3d 638, 687 (Cal. Ct. App. 2005) ($50 million).

Boerner v. Brown & Williamson Tobacco Co., 4:98-427 (E.D. Ark. May 23, 2003) ($15 million), *remitted by* 394 F.3d 594, 603 (8th Cir. 2005) ($5 million).

Henley v. Philip Morris Inc., No. 995172 (Cal. Super. Ct., Feb. 9, 1999, and Feb. 10, 1999) ($50 million), *remitted by* 9 Cal. Rptr. 3d 29, 75 (Cal. Ct. App. 2004) ($9 million).

Plaintiff's verdicts with punitive damages awards in which the award of compensatory damages was affirmed but the punitive damages verdict was reversed on appeal:

Burton v. Am. Tobacco Co.,205 F. Supp. 2d 1253, 1263–65 (D. Kan. 2002) ($15 million punitive damages award as to R.J. Reynolds Tobacco Company), *rev'd in part*, 397 F.3d 906, 914 (10th Cir. 2005) (striking punitive damages award).

Plaintiff's verdicts without punitive damages awards:

Carter v. Brown & Williamson Tobacco Corp., No. 95-934 (Fla. Cir. Ct. Aug. 9, 1996).

Eastman v. Brown & Williamson Tobacco Corp., No. 97-5968 (Fla. Cir. Ct. Apr. 3, 2003).

Kenyon v. R.J. Reynolds Tobacco Co., No. 00-5401 (Fla. Cir. Ct. Dec. 12, 2001).

Plaintiff's verdicts in which the jury awarded $0 damages:

Horton v. Am. Tobacco Co., No. 12325 (Miss. Super. Ct. Sept. 24, 1990).

Plaintiff's verdicts with punitive damages awards in which appeals are ongoing:

Bullock v. Philip Morris USA, Inc., No. BC249171 (Cal. Super. Ct. September 26, 2002, October 4, 2002) ($28 billion), *remitted by* 2002 WL 31833905 (Cal. Super. Ct. Dec. 18, 2002) ($28 million), *aff'd*, 42 Cal. Rptr. 3d 140 (Ct. App. 2006) (petitions for review to California Supreme Court filed by both parties).

Frankson v. Brown & Williamson Tobacco Corp., No. 24915/00 (N.Y. Sup. Ct. Dec. 18, 2003 and Jan. 9, 2004) ($20 million apportioned among four defendants, remitted to $5 million among three defendants by trial judge), *aff'd*, 2006 WL 1851266 (App. Div. July 5, 2006) (opportunity for further appellate review has not expired).

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Smith v. Brown & Williamson Tobacco Corp., No. 03-212922 (Mo. Cir. Ct. Feb. 1, 2005 and February 2, 2005) ($20 million) (appeal to intermediate appellate court pending).

Williams v. Philip Morris USA Inc., No. 9705-3957 (Or. Cir. Ct. Mar. 30, 1999) ($79.5 million, reduced by trial court to $32 million), *rev'd and remanded*, 48 P.3d 824 (Or. Ct. App. 2002) (reinstating $79.5 million award), *adh'd to on recons.*, 51 P.3d 670 (Or. Ct. App. 2002), *rev. denied*, 61 P.3d 938 (Or. 2002), *vacated*, 540 U.S. 801 (2003), *adh'd to on remand*, 92 P.3d 126 (Or. Ct. App. 2004), *aff'd*, 127 P.3d 1165 (Or. 2006), *cert. granted*, 126 S. Ct. 2329 (2006).

Plaintiff's verdicts without punitive damages in which appeals are ongoing:

Arnitz v. Philip Morris USA Inc., No. 00-4208 (Fla. Cir. Ct. Oct. 21, 2004), *aff'd*, No. 2D05-826, 2006 WL 2033902 (Fla. Dist. Ct. App. July 21, 2006) (opportunity for further appellate review has not expired).

Davis v. Liggett Group, Inc., No. 02-18944 05 (Fla. Cir. Ct. Apr. 28, 2004).

Thompson v. Brown & Williamson Tobacco Corp., No. 00-220555 (Mo. Cir. Ct. Nov. 4, 2003).

Plaintiff's verdicts for compensatory damages in which punitive damages have not been resolved:

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Engle v. R.J. Reynolds Tobacco Co., No. 94-8273 CA 22 (Fla. Cir. Ct. Apr. 7, 2000), *rev'd sub nom. Engle v. Liggett*

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In the Supreme Court of the United States

PHILIP MORRIS USA,
PETITIONER

v.

MAYOLA WILLIAMS,
RESPONDENT

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF FOR THE TOBACCO CONTROL LEGAL CONSORTIUM AND TOBACCO CONTROL RESOURCE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

EDWARD L. SWEDA, JR*
TOBACCO CONTROL
RESOURCE CENTER
Northeastern University
School of Law
102 The Fenway, Suite 117
Boston MA 02115
(617) 373-2026

MARK GOTTLIEB
TOBACCO CONTROL
RESOURCE CENTER
Northeastern University
School of Law
102 The Fenway, Suite 117
Boston MA 02115
(617) 373-2026

Counsel of Record for Amici

QUESTIONS PRESENTED

1. Whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible can ever create a situation where a greater than single digit ratio of punitive to compensatory damages is constitutionally permissible.

2. Whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The *amici curiae* are nonprofit organizations with a shared mission centered on improving public health and a shared belief that punitive damages play a critical role in our nation's civil justice system by deterring and punishing misconduct that threatens the public health.[1]

This brief is filed with consent of all parties by letters on file with the Clerk of the Court.

Tobacco Control Legal Consortium ("TCLC")

Amicus Curiae the Tobacco Control Legal Consortium ("TCLC") is a national network of legal centers providing legal technical assistance to public officials, health professionals and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of collaboration among specialized legal resource centers serving six states, and is supported by national advocacy organizations, voluntary health organizations and others.[2] In

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[1] Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* and their counsel made a monetary contribution to the preparation and submission of this brief.

[2] TCLC's coordinating office is located at the Tobacco Law Center of the William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include the Technical Assistance Legal Center (TALC) at the Public Health Institute of California, in Oakland, California; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy (TRC) at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Public Policy Center in Columbus, Ohio, the

addition, TCLC prepares legal briefs as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. TCLC has submitted *amicus* briefs in recent cases before the Supreme Courts of Florida, Kentucky, Montana, New Hampshire, and to the trial court in the U.S. Department of Justice tobacco litigation.

Tobacco Control Resource Center ("TCRC")

Amicus Curiae the Tobacco Control Resource Center, founded in 1979, is a division of the Public Health Advocacy Institute devoted to supporting and enhancing public health understanding and commitment among law teachers and students, legislators and regulators, the courts, and others who shape public policy through the law.

SUMMARY OF ARGUMENT

This Court's jurisprudence on the constitutionality of large punitive damages awards to date has left open the possibility that in very limited circumstances, where a defendant's conduct is extremely reprehensible and causes significant physical injury or death, a ratio of punitive to compensatory damages above 4 to 1 may be permissible.

Verdicts involving cigarette manufacturers such as the present case are leading candidates to be that rare exception where such higher ratios are

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Tobacco Control Resource Center (TCRC) at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project (SFELP) at the Center for Social Gerontology in Ann Arbor, Michigan; and the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey.

permissible because: a) the conduct underlying the tort has been found to be extremely reprehensible; b) the conduct resulted in significant physical harm to the Respondent's spouse; and c) the Petitioner and other cigarette companies have long engaged in a campaign of extremely aggressive litigation tactics designed to deter plaintiffs such as the Respondent from ever reaching the courtroom.

Such conduct can be regarded as a secondary reprehensibility that prevents non-parties suffering nearly identical injuries arising out of the same primarily reprehensible conduct that triggered the award of punitive damages from utilizing the civil justice system. Numerous examples of such conduct are cited.

When defendants are able to engage in such conduct to "evade capture," or "beat the system," an analysis of the punitive damages award should take secondary reprehensibility into account.

ARGUMENT[3]

The need to take measures to punish bad behavior long has been recognized. Such measures serve a vital public health purpose by creating a powerful market disincentive to discourage behaviors that create a high likelihood for harming the public's health.

While compensatory damages seek to recompense

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[3] The arguments made herein largely are adapted from an article published in 2005 in the University of Pittsburgh Law Review. Sara D. Guardino & Richard A. Daynard, *Punishing Tobacco Industry Misconduct: The Case for Exceeding a Single Digit Ratio Between Punitive and Compensatory Damages*, 67 U. Pitt. L. Rev. 1 (2005) [hereinafter "*Guardino*"].

a plaintiff for injuries suffered where a fact finder determines liability, punitive damages are "generally defined as those damages assessed, in addition to compensatory damages, for the purpose of punishing the defendant for aggravated or outrageous misconduct and to deter the defendant and others from similar conduct in the future." Marjorie A. Shields, *Annotation, Liability of Cigarette Manufacturers for Punitive Damages*, 108 A.L.R. 5th 343, 349-50 (2003). Because they are not based on the plaintiff's actual monetary or non-monetary loss, determining the appropriate amount of punitive damages within constitutional limits has been an ongoing concern.

I. THIS COURT HAS RECOGNIZED THE LEVEL OF REPREHENSIBILITY OF A DEFENDANT'S CONDUCT AS AN ESSENTIAL FACTOR IN DETERMINING WHETHER PUNITIVE DAMAGES ARE WARRANTED AND, WHERE WARRANTED, AT WHAT LEVEL.

In several notable cases, this Court has examined the factors contributing to a punitive damages award. None of these cases has established a bright-line "benchmark" for such awards, but rather, these cases have emphasized the importance of the defendant's reprehensibility in calculating the appropriate amount of punitive damages.

In *TXO Production Corp. v. Alliance Resources Corp.*, this Court stated its reluctance to adopt "an approach that concentrates entirely on the relationship between actual and punitive damages." 509 U.S. 443, 460 (1993). This Court found that when comparing

punitive and compensatory damages, it is more "appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.*

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996), this Court set down three "guideposts" for courts to consider when reviewing punitive damages awards:

> (1) the degree of reprehensibility of the defendant's misconduct;
>
> (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
>
> (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Gore, 517 U.S. at 574-75.

This Court declared that the first of these guideposts, the degree of reprehensibility, *is* "*[p]erhaps the most important indicium of the reasonableness of a punitive damages award . . . .*" *Id.* at 575 [emphasis added]. Although this Court overturned the punitive damages award, it again stated that it was "not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award."[4]

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[4] This Court found that the defendant's conduct was financially motivated, but not sufficiently reprehensible – particularly in that the health and safety of the consumer was never put at risk – to justify a large punitive damages award. *Gore*, 517 U.S. at 576.

In *State Farm Mut. Auto. Ins. Co. v. Campbell*, this Court again noted that it has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." 538 U.S. 408, 424-25 (2003). Rather than establish a bright-line ratio between punitive and compensatory damages, the Court stated that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.* at 426.

Importantly, the *State Farm* decision stated that "in practice, *few* awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" *Id.* at 425 (emphasis added). This Court thus left open the possibility that, in those "few" cases where the defendant's conduct is particularly reprehensible, a punitive damages award higher than nine times the compensatory damages amount may be permissible.

II. THE *WILLIAMS* RECORD IS RIFE WITH AN EXTRAORDINARY DEGREE OF REPREHENSIBILITY THAT SUGGESTS THAT IT WOULD BE ONE OF THOSE "FEW" INSTANCES WHERE A HIGH RATIO OF PUNITIVE TO COMPENSATORY DAMAGES IS JUSTIFIED.

In the course of the prior history of the present case, the Oregon Court of Appeals and the Supreme Court of Oregon concluded that Philip Morris's conduct was highly reprehensible. *Williams v. Philip Morris, Inc.*, 92 P.3d 126 at 142 (2004); *Williams v.*

This ruling suggests, however, that where the underlying conduct *is* reprehensible and reckless in regard to health and safety, more severe sanctions would not pose constitutional problems.

Philip Morris, Inc., 304 Or. 35 at 52 (2006). Neither court, after applying an analysis based on this Court's ruling in *State Farm*, held that *State Farm* bound them to restrict the punitive damages award to within a single-digit multiple of the compensatory damages award.

The Court of Appeals summarized the reprehensibility of the Defendant/Petitioner before this Court, holding that defendant Philip Morris "used fraudulent means to continue a highly profitable business knowing that, as a result, it would cause death and injury to large numbers of Oregonians." *Williams*, 92 P.3d at 142. The Supreme Court of Oregon emphasized the extremely reprehensible behavior by concluding that Philip Morris,

> with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect – and for two or more decades absolutely knew – that the scheme was damaging the health of a very large group of Oregonians – the smoking public – and was killing a number of that group.

Williams, 304 Or. 35 at 52.

III. THE CONCEPT OF REPREHENSIBILITY SHOULD INCLUDE "SECONDARY REPREHENSIBILITY," STEMMING FROM THE DEFENDANT'S LITIGATION TACTICS WHEN ANALYZING THE RATIO OF PUNITIVE TO COMPENSATORY DAMAGES.

Internal company documents, witness testimony, and judicial findings reveal that the Defendant/Petitioner and other tobacco companies

have long used their enormous wealth to make it exceedingly difficult for potential plaintiffs to find lawyers, and nearly impossible for those that do to maintain their cases.

Such behavior is evidenced by a now-infamous letter from R.J. Reynolds Tobacco Company counsel J. Michael Jordan to "Smoking and Health" lawyers. In the letter, Jordan discussed plaintiffs' attorney John Robinson's agreement "to dismiss his cases against the tobacco industry. " One factor that Jordan says contributed to this is that:

> the aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his.

Memorandum from Mike Jordan to S&H Attorneys (Apr. 28, 1988), at http://www.kazanlaw.com/verdicts/images/exb_d_sob.gif (last visited September 12, 2006). *See also Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993) (citing this letter). Jordan's letter embodies the spirit of "secondary reprehensibility." Such secondary reprehensibility involves the reprehensibility of the defendant's "scorched earth" litigation tactics, which often result in the plaintiff's inability to maintain an action against the defendant. *See Guardino* at 4.

Secondary reprehensibility is not a factor that would contribute to the jury's determination of compensatory damages or even whether punitive damages are appropriate. Such an analysis should be

an essential part of the review of a punitive damages award in those instances where the defendant's wealth has been used strategically to deter litigation. *Id.*

A. Judge Posner's Opinion in *Mathias*

In a post-*State Farm* Seventh Circuit decision, *Mathias v. Accor Economy Lodging, Inc.* ("*Mathias*"), Judge Richard A. Posner authored a decision holding that a defendant who uses wealth to make litigating a case against it extraordinarily difficult, if not impossible, may warrant a punitive damages award exceeding a single-digit ratio between punitive and compensatory damages. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003). It is precisely this sort of strategy that is contemplated in the secondary reprehensibility framework.

Mathias involved two plaintiffs who were bitten by bedbugs at a popular hotel chain location. They brought suit against the hotel's affiliated entities (collectively, the "defendant"),[5] claiming "that in allowing guests to be attacked by bedbugs in a motel that charges upwards of $100 a day for a room . . . the defendant was guilty of 'willful and wanton' conduct and thus under Illinois law is liable for punitive as well as compensatory damages." *Id.* at 674. Evidence showed that the hotel had sustained an escalating bedbug problem over prior years, yet had failed to hire an exterminator to remedy the problem. The court noted that the infestation "began to reach farcical proportions" when a guest who had complained about being bitten by bugs found bugs in two subsequent rooms to which the hotel moved him. *Id.* at 675.

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[5] The court treated the affiliated entities as a single entity.

Furthermore, hotel staff members were instructed to misinform guests by telling them that the bedbugs actually were ticks and to rent rooms that were designated to remain closed due to the infestation. *Id.* Such a room was rented to the plaintiffs, who suffered bites. A jury awarded each plaintiff $5,000 in compensatory damages and $186,000 in punitive damages, resulting in a ratio of 37.2 to 1 between the two awards. *Id.* at 674.

On appeal, Judge Posner found the defendant's conduct reprehensible enough to justify a punitive damages award. *Id.* at 675. Determining the appropriate *amount* of the award posed more of a challenge. Judge Posner reasoned that instead of following a set ratio, a court should consider "why punitive damages are awarded and why the [Supreme] Court has decided that due process requires that such awards be limited." *Id.* at 676.

While Judge Posner agreed that the punishment should fit the crime, and that there is a presumption against the fairness of double digit ratios, this "principle is modified when the probability of detection is very low . . . or the crime is potentially lucrative." *Id.* "The hotel's attempt to pass off the bedbugs as ticks . . . may have postponed the instituting of litigation to rectify the hotel's misconduct," he noted. *Id.* Furthermore, he found, the practice allowed the hotel to continue to generate revenue by renting infested rooms.

Judge Posner stated that the punitive damages award in this case:

> serve[d] the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should

> be punished twice as heavily in order to make up for the times he gets away.

Id. at 677.

Judge Posner took note of "the great stubbornness with which [the defendant] has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included." He concluded that the defendant was "investe[d] in developing a reputation intended to deter plaintiffs." *Id.*

Judge Posner found that the defendant's strategy was to use its wealth to engage in litigation tactics that made the cost of sustaining an action unbearable for plaintiffs so as to discourage counsel from bringing such cases on a contingency fee basis. *Id.* He therefore upheld the punitive damages award.

B. Law and Economics Applied to Tobacco Litigation

Judge Posner's decision in *Mathias* to hold the defendant accountable for its litigation tactics (i.e., its secondary reprehensibility) appears to be in accord with the ideas described in his book, The Economic Analysis of Law. In it, he describes the "Learned Hand Formula" of liability for negligence. *See* Richard A. Posner, Economic Analysis of Law 167-70 (Aspen 6th ed. 2003) [hereinafter "*Posner*"]. This formula takes into account the probability of a loss ("P") and the size of the loss ("L"). The expected cost of a loss is P times L. *Id.*

Posner reasoned that a manufacturer should take precautions up to and including the expected cost of a loss and, in most instances, pass this additional amount on to the consumer by adding it to the price of the product at issue. *Id.* at 98-99. This gives the

consumer the correct signal as to the product's total cost, enabling her to maximize her welfare with respect to this purchase. *Guardino* at 35.

If L were, for example, 50 cents for a bicycle, the manufacturer with an expectation of loss would add 50 cents per unit sold to the price to protect against the liability for L. Where there is no liability on the manufacturer's part, however, the consumer bears her own loss regardless of the manufacturer's behavior. In such a situation, the manufacturer has no expected loss per unit. However, if the consumer is informed perfectly about the product's safety (or lack thereof), she will in effect add the expected loss to the retail price of the bicycle to reflect its true cost. If, on the other hand, the consumers are not adequately informed about the product's risks, they will purchase the product even if they would not have done so had they known its true cost. *Posner* at 99-100. Because of the history of deception by cigarette manufacturers such as the Petitioner, smokers exemplify the "inadequately informed consumer" in the law and economics products liability model.

Despite the fact that contemporary smokers may be better informed about the risks today than they were decades ago, such general knowledge does not tend to translate into a personal belief that such risks apply to them. *See* K. Michael Cummings, et al., *Are Smokers Adequately Informed About the Health Risks of Smoking and Medicinal Nicotine*?, 6 Nicotine & Tobacco Research 1, 2 (Supp. 3, 2004). For instance, most smokers do not realize that so-called "light" or "low-tar" cigarettes are not safer than regular cigarettes. *See, e.g., id.* Additionally, smokers who have already died from cigarette-caused disease cannot benefit from any increased level of

information, nor can those who already are addicted or sick. *See Guardino* at 36.

Under the model articulated by Judge Posner, because these consumers were deceived and thus less than perfectly informed, and because their addiction and already-developing disease processes makes later-acquired knowledge less relevant, they did not fully account for the cost of the risk in their cigarette purchases. A law and economics model dictates that the cigarette manufacturers should carry the liability for those injuries to encourage them to be honest with their customers. *See* Jon D. Hanson & Kyle D. Logue, The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation, 107 Yale L.J. 1163 (1998).

IV. CIGARETTE MANUFACTURERS' REPREHENSIBLE LITIGATION TACTICS SHOULD PERMIT A SECONDARY REPREHENSIBILITY REVIEW AND CONSIDERATION OF A HIGHER RATIO OF PUNITIVE TO COMPENSATORY DAMAGES.

Documents produced in cigarette litigation demonstrate that the Petitioner and other cigarette manufacturers engage systematically in "scorched earth" litigation tactics and use their enormous financial advantage over plaintiffs to game the civil justice system to their advantage. Such behavior effectively denies access to the courts for the overwhelming majority of potential plaintiffs.

A. Conspiracy

While the Petitioner in the present case is Philip Morris, it is worth noting that many plaintiffs have alleged a conspiracy among cigarette manufacturers, and courts have reached verdicts supporting those

allegations. The most recent example is the ruling against the major cigarette manufacturers in the U.S. Department of Justice's massive lawsuit that resulted in defendants' liability under the Racketeer Influenced and Corrupt Organizations Act. *See United States v. Philip Morris USA, Inc.*, No. 99-2496, 2006 U.S. Dist. LEXIS 61412 at _____ (D.D.C. August 17, 2006) (finding that "Defendants are liable for conspiracy under 18 U.S.C. § 1962(d) of RICO because they both explicitly and implicitly agreed to violate 18 U.S.C. § 1962(c) of RICO.") *See also* findings of conspiracy among cigarette manufacturers in *Gladys Frankson, et al. v. Brown & Williamson Tobacco Corp. et al.*, No. 24915/00 (NY Sup. Ct. King's County, Brooklyn verdict issued January 9, 2004); *Engle v. Liggett Group, Inc.*, 2006 Fla. LEXIS 1480 (Fla. S. Ct. 2006) (applying *res judicata* effect of jury's classwide conspiracy finding); *Henley v. Philip Morris, Inc.*, 9 Cal. Rptr. 3d 29 (Cal. Ct. App. 2004), *aff'd*, 18 Cal. Rptr. 3d 873 (2004), *cert. denied*, 73 U.S.L.W. 3555 (U.S. Mar. 21, 2005) (No. 04-816); and *Boeken v. Philip Morris, Inc.*, 127 Cal. App. 4th 1640 (Cal. Ct. App. 2005).

1. Never Settle

The cigarette industry's generally successful litigation history is largely due to an early decision to fight the lawsuits at any cost and never consider even the most modest settlement. The industry felt then, and still does, that if any case were settled, there would be tens of thousands of potential claimants to whom payment – no matter how small – would be prohibitive. *See, e.g.*, E.J. Jacob & Jacob Medinger, *Report Prepared by RJR Outside Legal Counsel Transmitted to RJR Executives for the Purpose of Rendering Legal Advice Concerning Smoking and Health Issues and Litigation*, Bates: 504681987-504682023,

http://tobaccodocuments.org/bliley_rjr/504681987-2023.html, at 50468-1997 (June 27, 1980).

A central strategy for the cigarette industry's approach to litigation "is a lavishly financed and brutally aggressive defense that scares off or exhausts many plaintiffs long before their cases get to trial." Patricia Bellew Gray, *Legal Warfare: Tobacco Firms Defend Smoker Liability Suits With Heavy Artillery*, Wall St. J., Apr. 29, 1987, at 25. Those plaintiffs who proceed with their cases "are vastly outgunned," encountering the tobacco industry's "overwhelming strength and prowess at every turn." *Id.*

As J.F. Hind, an R.J. Reynolds director from 1979 to 1980, stated, the industry must "[v]igorously defend any case; look upon each as being capable of establishing dangerous precedent and refuse to settle any case for any amount." J.F. Hind, *Report Concerning Smoking and Health Prepared by RJR Employee Providing Confidential Information to RJR In-House Legal Counsel, to Assist in the Rendering of Legal Advice, and Transmitted to RJR Managerial Employee*, Bates: 505574976-505574977, http://tobaccodocuments.org/bliley_rjr/505574976-4977.html, at 50557-4977 (June 29, 1977).

2. Extreme Investigation Tactics as Intimidation

A 1988 Philip Morris document entitled "Depositions, Discovery and Investigations Position Statement," attributed to Philip Morris's Victor Han,[6]

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[6] Han was, at various times, Director of Communications for Philip Morris's Worldwide Regulatory Affairs office (1993-95), directed Philip Morris strategy and implementation of internal and external communications, and worked for Philip Morris Corporate Affairs. *See* Han, Victor, at http://tobaccodocuments.org/profiles/people/han_victor.html .

states: "It is standard practice in all contemporary litigation for plaintiff and defendant attorneys to seek information that could be pertinent in any given court case." V. Han, *Depositions, Discovery and Investigations Position Statement*, Bates: 92347681, viewed at http://tobaccodocuments.org/blileylor/92347681.html, at 92347681 (Apr. 1, 1988). Mr. Han cited an array of dubious rationales such as stress, diet, cholesterol levels or individual behavioral characteristics as justification for his conclusion that "the backgrounds of plaintiffs must be investigated thoroughly to ascertain which of these factors they encountered during the course of their lives." *Id.*

Another industry document instructs investigators working on smoking litigation for Philip Morris to interview the plaintiff's co-workers, supervisors, neighbors, friends, relatives, schoolmates, teachers, and athletic coaches in order to learn about factors such as the plaintiff's lifestyle. *International Product Liability Conference* 11/12-13/1992, Bates: 2501196322-2501196529, http://tobaccodocuments.org/bliley pm/27390.html, at 2501196360 (Nov. 1, 1992).

In a case involving cigarette manufacturer R.J. Reynolds, *Galbraith v. R.J. Reynolds Tobacco Company*, tobacco industry scorched earth litigation tactics were particularly well-documented. *See* William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 4 Tob. Prod. Litig. Rptr. 4.11 (1989). *Galbraith* was a personal injury action tried in Santa Barbara, California, on behalf of smoker John Galbraith and his wife in 1985. According to the plaintiff's attorney, Paul Monzione, Reynolds initially sent subpoenas to "all of Mr.

Galbraith's former employers back to the time that [he] was a very young man," and demanded documents from the plaintiff such as Christmas cards, family diaries, phone logs, and lists of attendees at the family's weddings and birthdays." *Id.* at 4.23. After obtaining this documentary evidence, Reynolds "began noticing depositions and subpoenaing witnesses for depositions virtually all over the United States." *Id.* Those deposed included "anyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses, former spouses of family members, neighbors and store owners in the neighborhood where Plaintiff lived." *Id.* The depositions "would last for hours, and very little, if any relevant or admissible evidence would be obtained." *Id.* Galbraith's wife was deposed for ten days; his mother for several days. According to Monzione, Reynolds justified the depositions by arguing that they needed to obtain information such as whether Galbraith "ate red meat, or used pesticides in his garden . . . ." *Id.*

Despite Reynolds's "burdensome and unreasonable discovery," the company "object[ed] to the vast majority of interrogatories propounded by Plaintiff, and caus[ed] Plaintiff to file motions to compel discovery responses." *Id.* The court granted most of these motions, "but only after great time, inconvenience, and expense." *Id.* Monzione concluded that plaintiffs cannot bring tobacco cases cost effectively "if defendants and their counsel are allowed to engage in what is obviously an approach designed to dissuade and deter plaintiffs from bringing other cases and to force plaintiffs to dismiss these cases rather than try them." *Id.*

A document from a collection of discovery materials originating with Brown & Williamson

Tobacco Company was prepared by the law firm of Jones, Day, Reavis & Pogue. It urges that a defense oriented pre-trial record be created that involves the "taking of extensive admission-oriented depositions" because this experience would impress "upon the plaintiffs, their lawyers, and their experts the seriousness of the commitment they must make in bringing these cases." Jones Day, *Smoking and Health Litigation-Tactical Proposals*, Bates: 680712261-680712337, http://tobaccodocuments.org/ness/38741.html, (Aug. 10, 1985).

The "General Patton" strategy of sparing no expense to force the plaintiff to spend all of its money has been documented industry-wide as a means to discourage litigation. It is never part of the underlying tort in a smoker's lawsuit, but it is part of a pattern of secondary reprehensibility that helps these cigarette manufacturers to escape capture in the civil justice system.

3. Document Destruction

Some of the aggressive tactics described, while forming an industry pattern of scorched earth litigation, arguably may be seen as falling under the attorneys' duty to zealously represent their clients. The tobacco industry's litigation tactics, however, too often have extended beyond the boundaries of zealous advocacy and into the realm of unprofessional conduct. As the Model Rules of Professional Conduct caution, the "lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." *Model Rules of Prof'l Conduct* R. 1.3 cmt. 1 (2003). Furthermore, lawyers may not "unlawfully obstruct another party's access to evidence or

unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." *Id.* Unfortunately, the tobacco industry has a disturbing record of document destruction.

A 1969 memorandum from Murray Senkus, a Reynolds chemist who ultimately became its Director of Scientific Affairs, to Reynolds General Counsel Max H. Crohn states: "We do not foresee any difficulty in the event a decision is reached to remove certain reports from Research files. Once it becomes clear that such action is necessary for the successful defense of our present and future suits, we will promptly remove all such reports from our files." Murray Senkus, *Memorandum Concerning Scientific Reports Prepared by RJR Scientist Working on Behalf of the Legal Department Legal Counsel for the Purpose of Providing Confidential Information to Assist in the Rendering of Legal Advice and Concerning Activities Performed on Behalf of the Legal Department*, Bates: 500284499, http://tobaccodocuments.org/bliley_rjr/500284499.html (Dec. 18, 1969).

An undated handwritten memorandum attributed to Thomas Osdene, Philip Morris's Director of Research, instructs directly: "Ok to phone & telex (these will be destroyed). . . . If important letters or documents have to be sent please send to home -- I will act on them [and] destroy." Thomas Osdene, *I will act on them and destroy*, http://tobaccodocuments.org/landman/183546.html.

Such actions are not relegated to ancient tobacco litigation history. In pretrial discovery during the U.S. Department of Justice RICO litigation, the court sanctioned Philip Morris for violating its own document retention policy in self-serving ways by

destroying potentially important e-mails. Judge Kessler wrote:

> Despite the lengthy submissions and explanations, there is no question that a significant number of emails have been lost and that Philip Morris employees were not following the company's own internal procedures for document preservation. What is particularly troubling is that Phillip Morris specifically identified at least eleven employees who failed to follow the appropriate procedures, and that those eleven employees hold some of the highest, most responsible positions in the company. These individuals include officers and supervisors who worked on scientific, marketing, corporate, and public affairs issues that are of central relevance to this lawsuit.
>
> Specifically, they include, among others, the *Director of Corporate Responsibility*, the Senior Principal Scientist in Research Development and Engineering, and the Senior Vice President of Corporate Affairs. All but one of the eleven employees were noticed for deposition by the United States.

United States v. Philip Morris USA, Inc., No. 99-2496 at 2 (Memorandum and Opinion D.D.C. July 21, 2004) [emphasis added]. The Court also noted, "it is astounding that employees at the highest corporate level in Philip Morris, with significant responsibilities pertaining to issues in this lawsuit, failed to follow Order #1, the document retention policies of their own employer." *Id.* at 4.

More than three decades of self-serving document destruction strongly suggest that these companies are brazenly abusing civil litigation to avoid capture.

This secondary reprehensibility requires redress on those exceedingly rare occasions where punitive damages are available against them.

4. Filing Motions for Tactical Advantage

Tobacco defendants are infamous among plaintiff's attorneys for filing a bewildering number of motions. One internal industry document instructs that "it is critical to file a series of motions *in limine* before each trial," to gain the "slight tactical advantage found in forcing plaintiff's counsel, on the eve of trial, to respond to such motions and to formulate alternative trial strategies in the event that any of defendants' motions are granted" Jones Day, *Smoking and Health Litigation-Tactical Proposals,* Bates: 680712261, http://tobaccodocuments.org/ness/38741.html, (Aug. 10, 1985). This advice comes perilously close to violating Federal Rule of Civil Procedure Rule 11, which prohibits filing motions for "any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. §11.

Failure to produce documents by cigarette companies is another well-known tactic, whether or not such documents have been destroyed. In the State of Minnesota's lawsuit against the major cigarette manufacturers in the 1990s, epic discovery battles took place. *See State of Minnesota et al. v. American Tobacco Co., et al.* No. C1-94-8565 (Minn Dist. Ct., Ramsay County, *Filed* August 17, 1994). Here, a law firm representing a state and HMO (Minnesota Blue Cross Blue Shield) was able to steadfastly maintain its discovery efforts despite a pattern of willful non-compliance with discovery orders that resulted in countless Motions to Compel. *See, e.g.,* Ciresi, Walburn, & Sutton, *Decades of Deceit: Document*

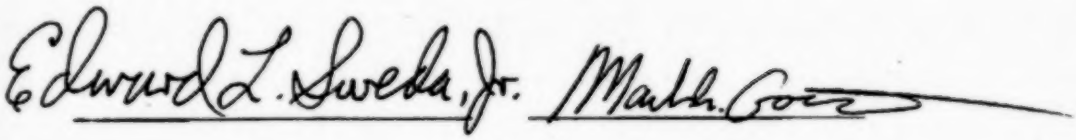
Discovery in. the Minnesota Tobacco Litigation. 25 William Mitchell Law Rev. 477-566 (1999); Guardino, Friedman & Daynard, *Remedies for Document Destruction: Tales from the Tobacco Wars*, 12 Va. J. Soc. Pol'y & L. 1 (2004).

Such tactics to deliberately create litigation costs to deter plaintiffs' lawyers from filing cases against the Petitioner and other cigarette companies is yet another example of the tobacco industry's secondary reprehensibility. Considering the effect of this secondary reprehensibility on the non-parties deterred from reaching the courtroom due to such tactics is an important way to meaningful punish and deter such conduct. This will require a punitive damages ratio to compensatory damages greater then 1 to 1, 4 to 1, or even 10 to 1 in those extremely uncommon situations where such defendants fail to evade capture.

V. CONCLUSION

Particularly aggressive litigation tactics employed by the Petitioner and other cigarette manufacturers that are designed to create expense to deter plaintiffs from utilizing the civil justice system create a plus factor in any analysis of the amount of punitive damages awarded. Such secondary reprehensibility is important for courts to recognize because it is needed for punitive damages to achieve the dual goals of punishment and deterrence for defendants that not only exhibit extremely reprehensible behavior that causes bodily injury and death, but also use their vast wealth to use the civil justice system in such a way as to prevent potential plaintiffs from ever reaching the courtroom. The harm to these non-parties should be considered when reviewing the appropriateness of punitive damages awards involving defendants that have utilized such tactics.

Respectfully submitted,



EDWARD L. SWEDA, JR*
TOBACCO CONTROL RESOURCE CENTER
Northeastern University School of Law
102 The Fenway, Suite 117
Boston MA 02115
(617) 373-2026

MARK GOTTLIEB
TOBACCO CONTROL RESOURCE CENTER
Northeastern University School of Law
102 The Fenway, Suite 117
Boston MA 02115
(617) 373-2026

Counsel of Record for Amici

712A

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PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENT

ARTHUR H. BRYANT
TRIAL LAWYERS FOR PUBLIC JUSTICE
555 12th Street
Suite 1620
Oakland, CA 94607
(510) 622-8150

LESLIE A. BRUECKNER
TRIAL LAWYERS FOR PUBLIC JUSTICE
1825 K Street, N.W.
Suite 200
Washington, DC 20006
(202) 797-8600

MICHAEL V. CIRESI
ROBERTA B. WALBURN*
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8500

**Counsel of Record*

Counsel for Amicus Curiae
Trial Lawyers for Public Justice

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that marshals the skills and resources of trial lawyers to create a more just society. TLPJ has pioneered cases advancing consumers' rights, preserving the environment, upholding civil rights and liberties, and safeguarding the civil justice system.

TLPJ seeks to vindicate individual rights by holding wrongdoers accountable for their misconduct. Punitive damages are a vital weapon in this effort. If punitive damages awards are arbitrarily restricted, without allowing for flexibility as warranted by the facts of each case, the purposes these damages are meant to serve – to punish unlawful conduct and deter its repetition – will be thwarted. That is particularly true in an exceptional case such as the present, where the Petitioner and other tobacco companies, working together, have carried out an extended campaign of fraud and deceit, with disastrous consequences for the public health.

In addition, Michael V. Ciresi and Roberta B. Walburn, counsel for *amicus*, represented the State of Minnesota and Blue Cross and Blue Shield of Minnesota in litigation against the tobacco industry from 1994 through 1998. The Minnesota tobacco litigation included an intensive discovery effort, which led to the production of approximately 35 million pages of industry documents. *See generally* Michael V. Ciresi, Roberta B. Walburn & Tara D. Sutton, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV.

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[1] No counsel for a party in this case authored this brief in whole or in part, and no person, other than the undersigned *amicus* and its counsel, has made a monetary contribution to the preparation and submission of this brief. Both parties have consented to the filing of briefs *amicus curiae* in this case. Letters of consent are on file with the Clerk of the Court.

477 (1999). Many of these documents, which detail decades of intentional wrongdoing, were exhibits in the case presently before this Court.

These documents – and the long-standing fraudulent conduct of Petitioner – present a compelling paradigm for a large award of punitive damages. Accordingly, TLPJ submits this *amicus* brief in support of respondent.

SUMMARY OF ARGUMENT

Litigation against the tobacco industry began in 1954. The industry faced a collective crisis – a great cancer scare – that threatened its existence. Together, the tobacco companies, including Petitioner Philip Morris USA ("Philip Morris"), fought back with a campaign of deceit and deception. Part of that campaign was waging a war of attrition in courtrooms around the nation, abusing the legal process and concealing evidence.

For year after year, decade after decade, individual smokers sued tobacco companies, including Petitioner. The industry beat them back with aggressive, no-money-spared litigation. For decades, the industry paid not one penny, by way of judgment or settlement.

While the tobacco industry's unblemished winning streak remained intact, the industry kept its internal company documents – damning evidence that directly refuted its litigation positions – hidden away. For example, while the battleground in the early cases was whether smoking caused cancer, by the 1950s virtually the entire industry recognized the causal link, according to industry documents. But it took more than 40 years of litigation, until the late 1990s, for millions of pages of these industry documents to be disclosed.

Because Petitioner was able to evade accountability for so long, it was not forced to bear the costs of its transgressions. There was no financial incentive, as there typically is through tort law, for Petitioner to change its conduct, and so its wrongdoing continued. Thus, as recently as August 2006, the federal judge presiding over the

U.S. Department of Justice ("DOJ") tobacco litigation found that Petitioner and the industry engaged in a 50-year scheme in violation of racketeering laws – "with little, if any, regard for individual illness and suffering . . . or the integrity of the legal system" – and further found that the racketeering continues to this day.

With this history, the award of punitive damages in this case – which amounts to little more than 2½ weeks of Petitioner's profits – fits within this Court's jurisprudence. If ever there was a defendant whose conduct demonstrates the necessity of this Court "consistently reject[ing] the notion that the constitutional line is marked by a simple mathematical formula" for punitive damages, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) – this is that defendant. This defendant also demonstrates the need to assess the impact of the defendant's similar – in fact, identical – conduct on nonparties. In sum, this case, and its extraordinary facts, demonstrate that flexibility in the due process analysis is essential to achieve the purposes of punitive damages – to punish and to deter.

ARGUMENT

I. THE TOBACCO INDUSTRY HAS EVADED LIABILITY FOR DECADES BY ABUSING THE LEGAL PROCESS AND CONCEALING EVIDENCE - AND THE RESULT HAS BEEN A PUBLIC HEALTH CATASTROPHE

A. General Patton Goes to Court

[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all of his.

Memorandum from R.J. Reynolds Tobacco attorney (Apr. 29, 1988), quoted in *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993).

1. The First Wave of Personal Injury Litigation

In the early 1950s, several scientific studies linking smoking and lung cancer were published. This caused a public sensation and a great cancer scare. In response, in December 1953, the leaders of the tobacco companies – including the president of Philip Morris – met in New York's Plaza Hotel to formulate a plan of action, as detailed in an industry document from that time. Hill & Knowlton, Background Material on the Cigarette Industry Client (Dec. 15, 1953), http://legacy.library.ucsf.edu/tid/wyb42c00.[2] This was the first meeting of the industry executives in years, as "criminal convictions" under antitrust laws had led them to keep their distance. *Id.* But with the death toll from lung cancer at 25,000 a year and rising, the "very existence" of the tobacco industry was threatened. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 858 (1992).

As a result of the Plaza Hotel meeting, the industry – including Philip Morris – published a full-page advertisement in newspapers around the country on January 4, 1954, titled "A Frank Statement to Cigarette Smokers." J.A. 202a-04a. The "Frank Statement" was the symbolic kickoff of the industry's decades of deceit:

> • The "Frank Statement" raised doubts about the causal link between smoking and disease: "For more than 300 years tobacco has given solace, relaxation, and enjoyment to mankind. At

[2] This tobacco document and the others cited herein are posted in full text by the Legacy Tobacco Documents Library, a digital library established by the University of California, San Francisco Library and the American Legacy Foundation (which was created as a result of the Master Settlement Agreement between state attorneys general and the tobacco industry).

one time or another during those years critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence."

- The "Frank Statement" propounded misrepresentations and false promises: "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business. We believe the products we make are not injurious to health. We always have and always will cooperate closely with those whose task it is to safeguard the public health."
- The "Frank Statement" announced the creation of the Tobacco Industry Research Committee, later re-named the Council for Tobacco Research, which the industry proclaimed would conduct research under the direction of "a scientist of unimpeachable integrity," but which in fact served as a foundation of the industry's conspiracy.

That same year, 1954, the first personal injury cancer case was filed against the tobacco industry. Rabin, *supra*, at 857. The industry dug in. For decades, the companies worked together to counter claims against cigarettes and preserve their market. (The Oregon Supreme Court decision in this case is replete with references to industry-wide cooperation. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1168-70 (Or. 2006)). The industry's self-proclaimed General Patton-style of litigation took hold: aggressive, scorched-earth tactics, no offers of settlement (not "a penny," in the words of Philip Morris's general counsel),[3] and concealment of internal documents evidencing the industry's admissions that its product caused death and disease.

This was a strategy "unique in the annals of tort litigation." Rabin, *supra*, at 857. "From the beginning, the

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[3] *See Haines*, 814 F. Supp. at 421 n.13.

cigarette companies decided that they would defend every claim, no matter what the cost, through trial and any possible appeals." *Id.*

In the early years of litigation, the battleground was causation: did cigarette smoking cause lung cancer (and was that foreseeable)? A few early cases that persevered to trial illustrate the dominance of the causation issue and the industry's war of attrition:

- **Green v. American Tobacco:** This case wound through 12 years of litigation, two trials, five appeals, and two unsuccessful petitions for certiorari to this Court. Rabin, *supra*, at 861. In the first trial, eight physicians testified for each side – 16 in all. *Green v. American Tobacco Co.*, 304 F.2d 70, 72 (5th Cir. 1962). The jury found that the plaintiff's lung cancer was caused by smoking but no liability on the ground that the defendant could not have reasonably foreseen that cigarettes caused cancer. *Id.* at 71-72.

  In the second trial, the judge ruled that a breach of implied warranty required that defendant's cigarettes "endanger any responsible segment of the general public." *Green v. American Tobacco Co.*, 391 F.2d 97, 101-02 (5th Cir. 1968). This led, once again, to "a forensic battle of experts." *Id.* at 103. Defense experts testified that "[n]obody knows the cause" of lung cancer. *Id.* This appears to have been the decisive issue. *See Green v. American Tobacco Co.*, 409 F.2d 1166, 1167 (5th Cir. 1969) (Coleman, J., dissenting) (defendant evaded liability "by convincing a lay jury in a swearing match among super-scientists that such a product may somehow be reasonably safe for personal consumption by the general public."), *cert. denied*, 397 U.S. 911 (1970). Again, there was a verdict for defendant, which was upheld by the Fifth Circuit. *Id.*

  Even years before the *Green* litigation ended, however, the industry's internal documents already demonstrated widespread acknowledgement that smoking caused cancer.

- **Lartigue v. R.J. Reynolds Tobacco and Liggett and Meyers Tobacco:** Again, causation played a determinative role. The trial record filled 20 volumes, "most of it devoted to medical opinion." *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 22 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963). The jury heard details of the plaintiff's "long medical history": measles, pertussis, diphtheria, malaria, influenza, chronic tonsillitis, pyorrhea, gonorrhea, tertiary syphilis, rheumatism, and "all of his teeth pulled." *Id.* The tobacco companies argued "that, except for rheumatism, all of these ills aggravate and are suspected causes of cancer." *Id.* As remarkable as these arguments are by today's standards – and by the defendants' contemporaneous but secret documents at the time of the trial – they apparently swayed the jury. Thus, the trial judge stated that the jury "simply decided the plaintiff had failed to prove the causal connection between his smoking and his lung cancer. . . ." *Id.* at 23. The Fifth Circuit affirmed. *Id.*

- **Ross v. Philip Morris:** This case lasted 10 years, from 1954 through 1964. At trial, six physicians testified for Philip Morris that cigarettes did not cause the plaintiff's throat cancer, with some also testifying that alcohol was a suspected cause. *Ross v. Philip Morris & Co. Ltd.*, 328 F.2d 3, 5 (8th Cir. 1964). Thus, Philip Morris hid its internal knowledge of the causal connection between smoking and cancer and blamed alcohol, with trial evidence that included plaintiff's "history of indulgence, heavy at times, in alcoholic liquor" and arrests for driving while intoxicated. *Id.* The general verdict for Philip Morris was affirmed on appeal. *Id.*

One more case from the first wave of litigation demonstrates the frustration – and inability – of a trial judge in trying to control the industry's litigation conduct. The case of *Thayer v. Liggett & Myers Tobacco Co.*, 1970 U.S. Dist. LEXIS 12796 (D. Mich. 1970), ended in a jury verdict

for defendant. Afterwards, the trial court – disturbed by the defendant's "overwhelming superiority in resources" and "insatiable appetite for procedural advantage" – detailed the abuses. *Id.* at 18, 19. Among other things, the court noted that the defendant was evasive in discovery, *id.* at 5-6, 9-10; "confidently risked tactics" knowing that the plaintiff "could not afford the luxury of a mistrial," *id.* at 18, and obtained a sweeping protective order, "on grounds which later proved largely illusory," to isolate plaintiff's counsel. *Id.* at 16; *see also id.* at 10-14. Meanwhile, defense counsel freely engaged in extensive cooperation with other industry attorneys. *Id.* at 15 & n.8, 16, 17 n.10, 101-02.

The court concluded:

> The court is convinced that the magnitude of the impact of the disparity in resources between these parties, plus the sophisticated and calculated exploitation of the situation by the defendant, approaches a denial of due process which would compel the granting of a new trial.
>
> This question, unfortunately, is now moot because plaintiff cannot afford further proceedings.

Id. at 59.

2. The Second Wave of Personal Injury Litigation

The second wave of personal injury suits against the tobacco industry began in the 1980s. Rabin, *supra*, at 854. The industry's theme shifted to arguing that the hazards of smoking were common knowledge and that smokers were exercising their "freedom of choice" – and assuming the risk. *Id.* at 870. In short, the industry seamlessly shifted its battle cry from "smoking doesn't cause cancer" to "everybody knows." "Everybody," that is, except the

tobacco industry, which continued to assert that it was "not proven" that smoking caused any disease.[4]

The most notable case in the second wave of litigation was the *Cipollone* suit in New Jersey, which led to the first meaningful discovery of tobacco industry documents. Ciresi et al., *supra,* at 486. The result was the first verdict for a plaintiff. The judgment, however, was reversed in part on the issue of preemption, and remanded for further proceedings. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992).

Following this Court's decision, the *Cipollone* plaintiffs, after a decade of litigation, consented to a voluntary dismissal with prejudice. *See Haines*, 814 F. Supp. at 417 n.4. The New Jersey plaintiffs' attorneys – recognized at the time as "the leading law firm" in tobacco litigation – also moved to withdraw from related tobacco cases, citing the "unreasonable financial burden." *Id.* at 418, 425. In 10 years, not a single of the firm's cases had been resolved on the merits. *Id.* at 421 n.14.

Given this record, no lawyer was willing to take over these cases. *Id.* at 425. This was a familiar theme. As two other attorneys from the era wrote:

> The reality for most cigarette disease victims and their families is that they cannot find a lawyer to handle their case, no matter how hard they look. . . . [B]y making the cost of litigation so high, the cigarette manufacturers have closed

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[4] As late as 1998, Geoffrey C. Bible, chief executive officer of Philip Morris, testified that "everybody in the world believes smoking causes disease." But when asked if *he* believed smoking causes disease, Bible testified, "I don't know." Bible further testified:

> Q. Do you know how many have died as a result of smoking?
>
> A. How many people have died?
>
> Q. Died.
>
> A. I don't know if anybody has died. I just don't know, no.

Ciresi et al., *supra*, at 485 n.34.

> the courthouse doors to most people who have gotten sick or died from using their products.
>
> They have done this by resisting all discovery aimed at them. . . . They have done it by getting confidentiality orders attached to the discovery materials they finally produce, . . . forcing each plaintiff to reinvent the wheel. They have done it by taking exceedingly lengthy oral depositions of plaintiffs and by gathering . . . every scrap of paper ever generated about a plaintiff, from cradle to grave. And they have done it by taking endless depositions of plaintiffs, expert witnesses, and by naming multiple experts of their own for each specialty, such as pathology, thereby putting plaintiffs' counsel in the position of taking numerous expensive depositions or else not knowing what the witness intends to testify at trial. And they have done it by taking dozens and dozens of oral depositions, all across the country, of trivial fact witnesses, particularly in the final days before trial.

William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W. L. REV. 275, 276-77 (1989).

Other plaintiffs' attorneys from this time described similar tactics: "[T]he Defendants then began noticing depositions and subpoenaing witnesses for depositions virtually all over the United States. Defendants deposed anyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses, former spouses of family members, neighbors and store owners in the neighborhood where Plaintiff lived," *id.* at 297; "[T]he cigarette company defendants took 107 depositions, many of out-of-state persons, and used only two of them at trial," *id.* at 299; "Elementary school records from the 1930s from a small town in Kentucky were obtained. When an objection

was made, the explanation was that he might have had a health course in the elementary grades." *Id.* [5]

In the end, this round of litigation concluded with the tobacco industry's undefeated record intact. After almost 40 years of litigation, and 300 cases filed since the 1950s, there still was not a single judgment – or penny paid – to plaintiffs. *Haines*, 814 F. Supp. at 428 n.31.

3. The Attorneys General Litigation

The third wave of tobacco litigation began in 1994. Ciresi et al., *supra*, at 487-88. This era included new types of cases, including class actions. But the major breakthrough came in the attorneys general litigation, when Mississippi and then Minnesota were the first states to file suits to recoup the costs of medical care for smokers. *Id.* Soon the industry and its counsel were facing not individual smokers but attorneys general across the nation. The damages claims measured well into the billions of dollars. And discovery battles were forcing the production of millions of documents that had never before seen the light of day, disclosing the industry's secret acknowledgement of the health hazards of smoking, the intentional manipulation of nicotine, and marketing to – and addicting – youth to replace smokers who died. *Id.* at 479.

The industry could no longer maintain its "no settlement" strategy. In 1997 and 1998, the tobacco industry entered into settlement agreements, first with four individual states and then a Master Settlement Agreement with the remaining 46 states. The settlement agreements provided for the payment of billions of dollars to the states. In addition, there was an array of non-monetary relief. This included restrictions on the advertising,

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[5] In addition, "One strange tactic has emerged in cancer cases. The cancer type is always accused of being some strange, nonsmoking type." *Id.* at 303. Compare, in the present case, *Williams v. Philip Morris Inc.*, 48 P.3d 824, 829 n.4 (Or. Ct. App. 2002) ("*Williams I*") ("Defendant's experts testified that Williams had an extremely rare form of cancer that is not related to smoking.").

marketing, and promotion of cigarettes (prohibiting targeting youth, banning the use of cartoons, banning billboards, etc.). The settlements also provided for dissolution of tobacco industry trade groups. *See generally* National Association of Attorneys General Projects: Tobacco, http://naag.org/issues/issue-tobacco.php.

And the settlement agreements provided for the public release of millions of pages of previously secret tobacco company documents.

B. The Tobacco Documents

1. The Concealment

Industry lawyers were well aware that disclosure of their documents would change results in courtrooms. For example, in 1970, David Hardy of Shook, Hardy & Bacon, longtime counsel to tobacco companies and one of Petitioner's law firms in the district court, J.A. 18a, detailed his fears about the industry's documents:

> Fundamental to my concern is the advantage which would accrue to a plaintiff able to offer damaging statements or admissions by persons employed or whose work was done in whole or in part on behalf of the company defending the action. A plaintiff would be greatly benefited by evidence which tended to establish actual knowledge on the part of the defendant that smoking is generally dangerous to health, that certain ingredients are dangerous and should be removed, or that smoking causes a particular disease. *This would not only be evidence that would substantially prove a case against the defendant company for compensatory damages, but could be considered as evidence of willfulness or recklessness sufficient to support a claim for punitive damages. The psychological effect on judge and jury would undoubtedly be devastating to the defendant.*

Letter from David Hardy to DeBaun Bryant, Brown & Williamson Tobacco Corp. ("Brown & Williamson") 3-4

(Aug. 20, 1970), http://legacy.library.ucsf.edu/tid/tjc72d00 (emphasis added).

After the disclosures in *Cipollone*, the next documents breakthrough came in 1994, in quite a different manner. A paralegal working for a tobacco law firm took and distributed several thousand pages of internal documents. These were so explosive that The Journal of the American Medical Association ("JAMA") devoted virtually an entire issue to them, stating that the documents "make clear how the tobacco industry has been able to avoid paying a penny in damages and how it has managed to remain hugely profitable from the sale of a substance long known by scientists and physicians to be lethal." James S. Todd et al., *The Brown and Williamson Documents: Where Do We Go From Here?* 274 JAMA 256, 256 (1995).

And these documents were only the beginning. Next came the massive discovery effort in Minnesota.

It was an effort that no individual personal-injury plaintiff could have undertaken. Industry counsel fought disclosure at virtually every turn. There were word games, with defense counsel objecting to countless terms in document requests (for example, "addictive," "target levels of nicotine," and "document destruction policies"). Ciresi et al., *supra*, at 490. There were shell games. Philip Morris, for example, shielded scientific documents with its foreign affiliates, such as its INBIFO center in Cologne, Germany, "a locale where we might do some of the things which we are reluctant to do in this country." Philip Morris U.S.A. Inter-Office Correspondence, H. Wakeham to C.H. Goldsmith (Apr. 7, 1970), http://legacy.library.ucsf.edu/tid/rzq24e00; *see also Williams*, 127 P.3d at 1169 (Petitioner conducted research in its European laboratory and was "careful to avoid preserving records of the results in this country."); Ciresi et al., *supra*, at 494-98.[6]

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[6] One document illustrating Philip Morris's attempt to conceal documents abroad is a handwritten note by the company's research director, which stated:

(Continued on following page)

There were countless motions to compel. One battle – over production of the industry's document indices – lasted 16 months, with eight orders in the trial court, unsuccessful appeals by the industry to the Minnesota appellate courts, and a petition for certiorari to this Court, which was denied. At first, industry attorneys claimed that they had no relevant indices. Later, industry attorneys acknowledged their existence – indeed, one company stated that it spent $90 million on its indices – but claimed they were protected by the attorney-client or work product doctrines. When the indices finally were produced, then-President Clinton called them a "road map" that "could improve significantly the ability of public health experts, scientists, state and federal officials, and the public to search through industry documents." Ciresi et al., *supra*, at 490-94.

But the most intense discovery effort in the Minnesota litigation – with more than 20 trial court orders, multiple appeals, and another unsuccessful petition for certiorari to this Court – was waged over documents that industry attorneys withheld on claims of attorney-client and work product protection. *Id.* at 499, 555-57. Many documents withheld on claims of privilege were authored by scientists but laundered through lawyers to conceal industry knowledge of health hazards. *Id.* at 507, 509, 512. Philip Morris, for example, listed on its Minnesota privilege log more than 5,000 documents either authored by or received by its top-ranking scientists. *Id.* at 507.

Ultimately, more than 39,000 documents listed on the industry's privilege logs were ordered produced, with the

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1. Ship all documents to Cologne. . . .
2. Keep in Cologne.
3. OK to phone & telex (these will be destroyed.). . . .
6. If important letters or documents have to be sent, please send to home – I will act on them and destroy.

Handwritten notes by Thomas Osdene, http://legacy.library.ucsf.edu/tid/iyu53e00. In his deposition, Osdene pled the Fifth Amendment. Ciresi et al., *supra*, at 495.

trial court – ruling on privilege claims by categories because of the sheer volume of withheld documents – finding that the documents were not privileged in the first instance or were discoverable under the crime-fraud exception. *Id.* at 552-57; *see also Clark v. United States*, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the relation is abused.")[7]

All together, approximately 35 million pages of documents were produced in the Minnesota litigation. Ciresi et al., *supra*, at 479. Philip Morris alone produced more than six million pages in Minnesota – compared with only about 140,000 pages in all the previous years of litigation. *Id.* at 489. Another company, Brown & Williamson, produced more than four million pages in Minnesota – and only 1,350 pages in prior litigation. *Id.*

2. The Industry Admissions

When finally disclosed, the words of tobacco executives themselves provided an extraordinary window into the industry's long-standing fraudulent conduct. As the Oregon Supreme Court stated:

> [T]here can be no dispute that Philip Morris's conduct was extraordinarily reprehensible. Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue. It deliberately did so to keep smokers smoking, knowing that it was putting the smokers' health and lives at risk, and it continued to do so for nearly half a century.

William, 127 P.3d at 1177.

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[7] Other courts have also found that the tobacco industry abused claims of privilege. *See United States v. Philip Morris USA, Inc.*, No. 99-2496, at 1473-77 (D.D.C. filed Aug. 17, 2006) ("DOJ Final Opinion") (citing cases).

The impact the documents would have had on the early litigation – if the industry's secrets had been disclosed or if the industry had taken public and litigation positions consistent with its documents – is evident from an examination of even a few documents.

a. Causation

While the courtroom battles in the early litigation were being fought over whether smoking caused cancer, the tobacco companies themselves had already secretly acknowledged the causal link.

One document captures the admissions of the entire industry, as early as 1958. That year, three scientists from the British-American Tobacco Group ("BAT") visited the United States to learn "the extent to which it is accepted that cigarette smoke 'causes' lung cancer." H.R. Bentley et al., Report on Visit to U.S.A. and Canada 2 (1958), http://bat.library.ucsf.edu/tid/jrc54A99. Their itinerary showed visits to most of the American tobacco industry, including Philip Morris. *Id.* at 1. When they returned, the scientists wrote a trip report, stating:

> *With one exception . . . the individuals whom we met believed that smoking causes lung cancer* if by "causation" we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link.
>
> . . .
>
> Although there remains some doubt as to the proportion of the total lung cancer mortality which can be fairly attributed to smoking, *scientific opinion in U.S.A. does not now seriously doubt that the statistical correlation is real and reflects a cause and effect relationship.*

Id. at 2, 8 (emphasis added).[8]

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[8] The 1958 trip report was admitted into evidence in the present case and was cited by the Oregon Supreme Court. *Williams*, 127 P.3d at 1169; *see also* Ex. 28.

But it would take more than 40 years – until 2000, after the disclosure of this trip report and millions of other damning documents – for Philip Morris to publicly admit that smoking caused cancer and other diseases. DOJ Final Opinion 327.[9] Indeed, in the present case, Philip Morris maintained through trial that it was not proven that smoking caused cancer. *See* J.A. 52a.

The refusal to admit that smoking caused disease was driven by the industry's legal strategy. One document, written by a top attorney with BAT's American affiliate discussed the sentiment in chilling fashion:

> If we admit that smoking is harmful to "heavy" smokers, do we not admit that BAT has killed a lot of people each year for a very long time? Moreover, if the evidence we have today is not significantly different from the evidence we have five years ago, might it not be argued that we have been "willfully" killing our customers for this long period? Aside from the catastrophic civil damage and governmental regulation which would flow from such an admission, I foresee serious criminal liability problems.

Draft Memorandum, New Strategy on Smoking & Health, J.K. Wells, Brown & Williamson, para. 4 (1980), http://legacy.library.ucsf.edu/tid/edz95a00.[10]

Similarly, Philip Morris's research director acknowledged in 1961 that cigarettes contained many carcinogens, but "[i]nternal company memoranda . . . suggested that it could not admit those facts publicly because of adverse legal consequences." *Williams*, 127 P.3d at 1169.

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[9] Even to this day, however, Philip Morris "has never told its customers on its cigarette packaging or in onserts that it agrees that smoking causes cancer and other diseases in smokers. Its packages merely direct smokers to its website address." DOJ Final Opinion 328.

[10] In its brief, Petitioner criticizes the Oregon Supreme Court for comparing its conduct to manslaughter. Pet'r Br. 43. As demonstrated by the above document, however, criminal liability was a serious concern in the industry.

b. Addiction

By the second wave of tobacco litigation, the industry's theme was "freedom of choice." Privately, however, the industry recognized that this defense would be compromised by any admission that its customers were addicted.

One Tobacco Institute document, written on the eve of the second wave of litigation in 1980, summed up the effect of such an admission, stating, "Shook, Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as 'free choice' if the person was 'addicted.'" Memorandum from P. Knopick to W. Kloepfer 2 (Sept. 9, 1980), http://legacy.library.ucsf.edu/tid/ciu91f00.[11]

The industry's secret documents also described the purposeful manipulation of nicotine to exploit its addictive qualities. *See, e.g.*, Richard D. Hurt & Channing R. Robertson, *Prying Open the Door to the Tobacco Industry's Secrets About Nicotine: The Minnesota Tobacco Trial*, 280 JAMA 1173, 1178 (1998) ("Perhaps the most surprising finding in the document review was the evidence of industry-wide efforts spanning 3 decades to alter the chemical form of nicotine to increase the percentage of freebase nicotine delivered to smokers."); *see also Williams*, 127 P.3d at 1169 (Petitioner "spent considerable effort discovering ways to deliver the optimal dose of nicotine in each cigarette. . . .").

But Petitioner did not admit addiction publicly until 2000. DOJ Final Opinion 327.[12] Once again, legal strategy drove industry conduct on this critical public health issue.

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[11] The Tobacco Institute acted on behalf of Petitioner, *Williams I*, 48 P.3d at 834 n.13, and this document was admitted into evidence in the present case. Ex. 110.

[12] Philip Morris, however, still does not admit addiction in its product labeling. *Id.* In addition, Philip Morris removed the statement that "Smoking Is Addictive" from cigarette packs after buying brands from a competitor in 1999, even though the company agreed that the statement was "correct and material." *Id.* at 1608.

C. The Tobacco Industry's Wrongdoing Continues

The tobacco industry's decades of deceit are not only a matter of historical import. The past wrongdoing continues to kill thousands of smokers (such as respondent, who began smoking in the early 1950s as the industry conspiracy took hold. *See Williams*, 127 P.3d at 1168). In addition, the wrongdoing itself continues.

Thus, while Petitioner argues that it has changed its ways and that there will not be "any repetition of the conduct at issue here," Pet'r Br. 39-40, a blistering rebuke came just one month after Petitioner wrote these words. In August 2006, the district court in the DOJ tobacco litigation found that the industry – including Petitioner – "violated and continue to violate" the Racketeer Influenced and Corrupt Organizations Act ("RICO") and that "[t]here is a reasonable likelihood that Defendants' RICO violations will continue in most of the areas in which they have committed violations in the past." DOJ Final Opinion 1, 1606.[13]

This order was entered after seven years of litigation, the production of millions more pages of documents, and a bench trial of nine months. *Id.* at 3. The court found "overwhelming evidence," *id.* at 2, and summarized the industry's scheme as follows:

> [O]ver the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as "replacement smokers," about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted

[13] Philip Morris immediately announced that it would seek appellate review. *See* http://altria.com/media/press_release/03_02_pr_2006_08_17_01.asp.

> the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused the legal system in order to achieve their goal – to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.

Id. at 1500-01.

Repeatedly, the court cited the industry's abuse of the legal system, stating that, "At every stage, lawyers played an absolutely central role in the creation and perpetuation of the Enterprise and the implementation of its fraudulent schemes." *Id.* at 4. The court found that these actions furthered the RICO enterprise's goals, which included "avoiding or, at a minimum, limiting liability for smoking and health related claims in litigation." *Id.* at 1526.

The court also detailed the industry's manipulation of nicotine, finding that "[d]efendants have designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction." *Id.* at 515. Again, this is an issue of continuing significance. A study published shortly after the DOJ decision, for example, reported that nicotine yields rose an average of almost 10% from 1998 to 2004. *See* David Brown, *Nicotine Up Sharply in Many Cigarettes*, WASH. POST, Aug. 31, 2006, at A1 (citing study by the Massachusetts Department of Public Health). An increase of 12%, above the average, was reported for Petitioner's Marlboro cigarettes – the choice of two-thirds of high school smokers. *Id.*[14]

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[14] The court in the DOJ action awarded a variety of injunctive relief, including the dissemination of corrective health statements and the maintenance of websites and depositories for industry documents. However, the court found that a number of significant remedies – including a national smoker cessation program costing billions of dollars – were not available because of the limitation of relief under RICO. *Id.* at 3.

D. The Public Health Catastrophe

With the tobacco industry unscathed for so long in the courtroom, there was no incentive – as there typically is through tort law – for the industry to pay for the harms it caused and to change its conduct. Even now, with the industry losing some cases, the relief awarded to date has been scarcely comparable to the harm wreaked. The result of this unchecked wrongdoing is a public health catastrophe.

As this Court wrote in 2000, cigarette smoking is "one of the most troubling public health problems facing our Nation today. . . ." *FDA v. Brown & Williamson Tobacco Corp.*, 539 U.S. 120, 125 (2000). Cigarettes kill – often "long and painful deaths," in the words of the Food and Drug Administration ("FDA") – when used as intended. *Id.* at 135. Citing FDA documentation, this Court recited the litany of statistics. One in three regular smokers dies from cigarette-caused disease. *Id.* That amounts to more than 400,000 deaths each year in the United States from tobacco-related illnesses, including cancer, respiratory illnesses, and heart disease. *Id.* at 127-28. (With approximately half of the domestic market share, Philip Morris products cause 200,000 of those deaths. *See* Tr. Vol. 14-A at 57.) Tobacco use is the leading cause of preventable death in the United States, killing more people than AIDs, car accidents, alcohol, homicides, illegal drugs, suicides, and fire – combined. 539 U.S. at 135.

One commentator, writing in 1980, stated, "A striking irony emerges when one considers that the industry that markets the most dangerous product sold in America is the only industry that has been completely sheltered from the storm of twentieth-century product liability." Donald W. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1424 (1980).

A "striking irony," perhaps, but not happenstance. Cigarettes became "the most dangerous product" in part because the tobacco industry was not held accountable in court. Now, as the industry's past finally begins to catch

up with it, the full panoply of remedies – including punitive damages – is necessary to achieve justice.

II. THE AWARD OF PUNITIVE DAMAGE IN THIS CASE FITS WITHIN THIS COURT'S PRIOR JURISPRUDENCE

A. Petitioner's Evasion of Liability Must Be Taken Into Account to Achieve Punishment and Deterrence

This Court has repeatedly recognized that the central purposes of punitive damages are to punish the defendant and to deter future wrongdoing. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (punitive damages "are aimed at deterrence and retribution."); *Gore*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition."). The goal of deterrence applies not only to the defendant but to others as well. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (approving a jury instruction that punitive damages protect the public by deterring "'the defendant and others from doing such wrong in the future.'"); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages intended "to punish the tortfeasor" and "to deter him and others from similar extreme conduct.").

Clearly, if a defendant engages in a long campaign of fraud and deceit, that must be taken into consideration when it is finally caught. Otherwise, with the prospect of extraordinary profits from unpunished conduct, neither punishment nor deterrence will be achieved.

Judge Posner embraced this analysis in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), a decision affirming an award of punitive damages that was 37.2 times compensatory damages. Judge Posner wrote:

> The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.

347 F.3d at 677.

Mathias was a case involving bedbugs in a hotel, with evidence that defendant's conduct was "willful and wanton." *Id.* at 675. Judge Posner rejected defendant's argument that *State Farm* imposed a "single-digit-ratio rule." *Id.* at 676. Instead, Judge Posner wrote, "We must consider why punitive damages are awarded and why the Court has decided that due process requires that such awards be limited." *Id.* Thus, Judge Posner noted that defendant concealed its wrongdoing and that other hotel guests had been "endangered." *Id.* at 678. Judge Posner also took note of defendant's tactics of "investing in developing a reputation intended to deter plaintiffs," including "mount[ing] an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly. . . ." *Id.* at 677.[15]

Judge Calabresi adopted a similar analysis in *Ciraolo v. City of New York*, 216 F.3d 236 (2d Cir.) (Calabresi, J., concurring), *cert. denied,* 531 U.S. 993 (2000). Judge Calabresi noted that one goal of the tort system "is to ensure that actors bear the costs of their activities" and that a rational actor "will make some sort of formal or informal, spoken or unspoken, cost-benefit analysis . . . to determine if a particular activity is worth its price." *Id.* at 243. The system breaks down, however, if the actor is not held responsible for the costs of his actions. *Id.* This is the

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[15] Judge Posner stated that "modest stakes" were an additional disincentive to sue. *Id.* In the tobacco litigation, while the potential damages are much greater than a case involving bedbugs, so too are the litigation costs.

case when a tortfeasor conceals wrongful conduct. *Id.* This is also the case when not all tort victims bring suit (due to, among other things, "the time, effort, and stress associated with bringing a lawsuit."). *Id.* at 243-44. Judge Calabresi wrote:

> This idea is far from new. Many years ago, in an influential article that was in part responsible for his receipt of the Nobel Memorial Prize in economics, Professor Becker pointed out that charging a thief the cost of what he had stolen would not adequately deter theft unless the thief was caught every time. Since thieves will not always be caught, they must be penalized by more than the cost of the items stolen on the occasions on which they *are* caught. This "multiplier" is essential to render theft unprofitable and properly to deter it. . . . More recently, scholars have recognized that punitive damages can serve the same function in tort law.

Id. at 244 (emphasis in original), citing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 POL. ECON. 169 (1968); Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3 (1990), and A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 11 HARV. L. REV. 870 (1998).

Judges Posner and Calabresi both recognized that the assessment of punitive damages is not an exact science. As Judge Posner wrote in *Mathias*, "The judicial function is to police a range, not a point." 347 F.3d at 678. Similarly, Judge Calabresi wrote in *Ciraolo:*

> Such a calculation would rarely be precise. A rough estimate, however, would not be more unlikely than many other estimates that courts currently ask juries to make. Thus, juries are routinely required to estimate the monetary value of a plaintiff's pain and suffering, or of the loss sustained by a family as a result of a wrongful death, a sum that "defies any precise mathematical computation."

216 F.3d at 246 n.7 (citations omitted).

This Court cited Judge Calabresi's concurrence and supporting literature and discussed the issue of "defendant's evasion of liability" in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 438-40 (2001). The Court expressed concern that "juries do not normally engage in such a finely tuned exercise of deterrence calibration." *Id.* at 439. This analysis, however, was in the context of whether a jury award of punitive damages was a finding of fact that implicated the Seventh Amendment, not whether economic deterrence analysis could be used to assess punitive damages. Thus, this Court indicated that the economic efficiency approach might be "attractive . . . as an abstract policy matter" and further stated that a defendant's "'morally offensive conduct'" might be an additional consideration. *Id.* at 339-40 (citations omitted); *see also* Polinsky & Shavell, *supra*, at 907 n.120 (if a reprehensible act "is purely intentional, overdeterrence cannot occur.").

In the present case, unless Petitioner's repeated misconduct – including concealment of documents establishing legal liability – is taken into account, neither punishment nor deterrence will be achieved. Petitioner was able to conceal its wrongdoing until the release of its internal documents, decades into its fraud. Yet the punitive damages award of $79.5 million in this case amounts to only a little more than 2½ weeks of Petitioner's profits. *Williams I*, 48 P.3d at 841. Unless this award is upheld, the message to Petitioner – and other industries – will be to conceal wrongdoing and avoid legal liability, at all costs.

B. There Is No "Mathematical Bright Line" for Punitive Damages

The purposes of punitive damages can be achieved in this case, and the punitive damages award affirmed, within the parameters of this Court's three "guideposts." *See Gore*, 517 U.S. at 574-75. Two of the guideposts – the degree of reprehensibility ("[p]erhaps the most important indicium of the reasonableness of a punitive damages

award," *id.* at 575) and sanctions for comparable misconduct (manslaughter in this case) – overwhelmingly support the award. Petitioner focuses on the third guidepost, the ratio of punitive to compensatory damages.

But this Court has repeatedly stated that there is no "mathematical bright line" for a punitive damages award. *See, e.g., State Farm*, 538 U.S. at 424-25 ("[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. . . .We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."); *Gore*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula. . . ."); *Haslip*, 499 U.S. at 18 ("We need not, and indeed we cannot, draw a mathematical bright line. . . .").

This case presents a paradigm for exceeding a single-digit ratio, given the magnitude of Petitioner's wrongdoing and the resulting consequences. Certainly, if an award of 526 times actual damages can be affirmed in *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993), a case that involved slander of title for oil and gas rights and not the slightest physical harm to a single person, an award of 97 times actual damages should be affirmed in the present case. As the plurality stated in *TXO*, "[W]e do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character." *Id.* at 462 (citing factors including "malicious and fraudulent" conduct, "the amount of money potentially at stake," "the bad faith of petitioner," and "the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit.").[16]

Thus, even taking a restrictive view, this case is, in the words of the majority in *State Farm*, one of the "few

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[16] The comparison with *TXO* is similarly favorable if the reference is to "possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 460.

awards exceeding a single-digit ratio" to satisfy due process. 538 U.S. at 425.[17].

C. The Harm to Nonparties Is Particularly Relevant in This Case Given Petitioner's Decades of Wrongdoing

This case also underscores the necessity of a case-by-case approach in evaluating the effect of a defendant's conduct on nonparties. Without the flexibility to assess each case on its own facts – and, in this case, take into account the harm to thousands of identically-situated Oregonians – the purposes of punitive damages cannot be achieved.

This Court has recognized the relevance of harm to nonparties when justified by the facts. For example, the plurality in *TXO* noted that evidence of defendant's "alleged wrongdoing in other parts of the country" is "[u]nder well settled law . . . typically considered in assessing punitive damages." 509 U.S. at 462 n.28.

In *State Farm*, this Court's concern was "dissimilar acts":

> The [Utah] Courts awarded punitive damages to punish and deter *conduct that bore no relation* to the Campbells' harm. *A defendant's dissimilar acts, independent from the acts upon which liability was premised*, may not serve as the basis for punitive damages. A defendant should be

[17] The ratio issue is of even less consequence under the analyses of the three justices who dissented in *State Farm*. *See State Farm*, 538 U.S. at 429 (Scalia, J., dissenting) ("[T]he Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages."); *id.* at 429 (Thomas, J., dissenting) ("'I continue to believe that the Constitution does not constrain the size of punitive damages awards.'") (citations omitted); *id.* at 439 (Ginsburg, J., dissenting) ("Even if I were prepared to accept the flexible guides prescribed in *Gore*, I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders.").

> punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

538 U.S. at 422-23 (emphasis added). But *State Farm* recognized that similar wrongful acts are relevant, stating, for example, that, "Although *evidence of other acts need not be identical to have relevance* in the calculation of punitive damages, the Utah court erred here because evidence pertaining to *claims that had nothing to do* with a third party lawsuit was introduced at length." *Id.* at 423-24 (emphasis added).

Here, Petitioner's "other" wrongful acts were not only similar, but identical, to the acts that harmed respondent. As the Oregon Supreme Court stated, "[T]he jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large." *Williams*, 127 P.3d at 1175. The Oregon Supreme Court also specifically found that Philip Morris's conduct did harm other smokers.[18]

The relevance of harm to nonparties is of particular importance here because of Petitioner's success in concealing its wrongdoing and evading liability to other smokers. Evidence of Petitioner's litigation conduct was before the jury in this case. *See* Pet'r Br. 2 (evidence included "litigation positions"). In addition, the Oregon Court of Appeals recognized the concealment of industry documents, stating that, "The extent of defendant's actions did not become clear until judicially-required releases of documents occurred in the 1990s." *Williams I*, 48 P.3d at 840. There

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[18] The Oregon Supreme Court rejected Petitioner's arguments that its fraud did not injure nonparties, stating, "In essence, Philip Morris is claiming that one cannot reasonably infer that anyone was actually fooled by its 40-year advertising campaign directed to thousands of Oregonians. . . . Philip Morris's own conduct belies its protestations. As a for-profit corporation, it would not spend over 40 years of time, effort, and money to deceive people, unless it thought it was succeeding." *Williams*, 127 P.3d at 1171 n.1.

can be little doubt that had those documents been released earlier, the litigation results would have been dramatically different. Industry counsel recognized this; as attorney David Hardy wrote, the effect would "undoubtedly be devastating." Letter from David Hardy, *supra*.

This is not to say, however, that Petitioner should be punished for "hypothetical claims." *See State Farm*, 538 U.S. at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims. . . ."). Nonparties' claims are not being adjudicated, and nonparties are not being awarded damages. Instead, it is Petitioner's own conduct that is at issue. Indeed, Petitioner concedes that harm to nonparties may be considered, but only to determine where "within a confined range" – i.e., a single-digit ratio – the punitive damages award should fall. Pet'r Br. 22. Among other things, however, Petitioner's argument ignores this Court's repeated admonitions that there is no "mathematical bright line."[19]

Petitioner also raises the specter of multiple punishment for the same conduct. Here is a company that engaged in decades of deceit, killing thousands upon thousands, but, because of its abusive litigation tactics, has scarcely been touched by damages awards to smokers. *See, e.g.*, Pet'r Br. 13 ("[I]n the more than 50-year history of smoking-and-health litigation, only two individual cases have ever gone to trial in Oregon: the other claims were either voluntarily withdrawn, not pursued, or dismissed during motion practice."). Nevertheless, Petitioner cries wolf and argues that it is "in danger of being punished

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[19] *See also Gore*, 517 U.S. at 603 (Scalia, J., dissenting) ("[A] person cannot *be held liable to be punished* on the basis of a lawful act. But if a person has been held subject to punishment because he committed an *un*lawful act, the *degree* of his punishment assuredly *can* be increased on the basis of any other conduct of his that displays his wickedness, unlawful or not.") (emphasis in original).

repeatedly for the same harms." Pet'r Br. 8. A 50-year history belies that claim.[20]

And while industry documents are now available to potential plaintiffs, many thousands of smokers are long dead and for many reasons cannot, contrary to Petitioner's recommended jury instruction in this case, "bring lawsuits of their own."

CONCLUSION

Amicus respectfully submits that our legal system must empower justice in the present case through a jurisprudence of punitive damages that accomplishes the purposes of punishment and deterrence. The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

ARTHUR H. BRYANT
TRIAL LAWYERS FOR PUBLIC JUSTICE
555 12th Street
Suite 1620
Oakland, CA 94607
(510) 622-8150

LESLIE A. BRUECKNER
TRIAL LAWYERS FOR PUBLIC JUSTICE
1825 K Street, N.W.
Suite 200
Washington, DC 20006
(202) 797-8600

MICHAEL V. CIRESI
ROBERTA B. WALBURN*
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8500

**Counsel of Record*

September 2006

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[20] The threat of multiple punitive awards is also checked by an Oregon statute that takes into account "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's. . . ." Or. Rev. Stat. 30.925(2)(g); *see also* Or. Rev. Stat. 31.730(3).

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In The
Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF AMICUS CURIAE OF UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENT MAYOLA WILLIAMS

ARNOLD R. LEVINSON, ESQ.
Counsel of Record
PILLSBURY & LEVINSON, LLP
The Transamerica Pyramid
600 Montgomery Street, 31st Floor
San Francisco, CA 94111
Telephone: 415/433-8000

AMY R. BACH
Of Counsel
BACH LAW OFFICE
42 Miller Avenue
Mill Valley, CA 94941
Telephone: 415/381-7627

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*

United Policyholders is a national, not-for-profit educational organization whose mission is to educate the public, legislators and the courts on insurance issues and consumer rights, and to assist policyholders in securing prompt and fair insurance settlements.[1] The resolution of the issue presented in this case is of great importance to United Policyholders and its members because punitive damages are an extremely important tool in discouraging and deterring abusive claims behavior by insurers towards insureds.

SUMMARY OF ARGUMENT

We submit that the wisdom expressed by Justice Scalia becomes even more apparent in light of the present case. "The Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages. I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), is insusceptible of principled application; accordingly, I do not feel justified in giving the case stare decisis effect. . . ." *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 429 (Scalia, J., dissenting).

This Court has been remarkably effective in resolving procedural due process concerns regarding punitive damages. Unfortunately, the Court's attempt to create substantive due process boundaries for all cases, no matter the facts, law, defendants or jurisdiction is impossible. Punitive damages by their very nature differ widely from case to case. See, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 40-42 (1991) (Kennedy, J., concurring). Nonetheless, the result of the *Campbell* decision has been the application by the lower courts of a "one size fits all"

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[1] The letters of consent have been lodged with the Clerk of the Court by both petitioner and respondent. No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than United Policyholders and its members made any monetary contribution to the preparation or submission of this brief.

approach to the constitutionality of punitive damage awards. As we discuss below, this Court's prior experience with punitive damage awards well supports Justice Scalia's conclusion that principled application of the *Campbell* doctrine is logically and humanly impossible.

We submit that an even greater concern is that *Campbell*, as interpreted by the lower courts, *creates* due process violations by the imposition of boundaries and "guideposts" which do not and cannot be fairly applied. In an effort to reign in merely the perception[2] that punitive damage awards have run amuck, the Court has slayed the proverbial ant with the proverbial sledge hammer. True enough, the ant lay dead, but the collateral damage is worse than the harm offered by the ant in the first place. The "single-digit" ratio rule, now thoroughly embraced by the lower courts, has, in reality, become the one and only substantive due process test for punitive damage awards. Unfortunately, under this rule, the only parties who will truly be either punished or deterred from malicious malfeasance are those small companies, persons or entities against whom a single-digit award will have an impact. For those who are large enough to absorb single-digit awards with nary a glance, the single-digit rule only serves to incentivize the competition for mischievous behavior, thereby spurring its growth rather than deterring it.

ARGUMENT

1. The Court's Punitive Damage Jurisprudence Is Without Historical or Precedential Foundation.

This Court's punitive damage jurisprudence has wandered seemingly rudderless across its own prior

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[2] "There appears to be a consensus among researchers that, media perceptions notwithstanding, large and disproportionate punitive damage awards are *not* a problem in our judicial system in any significant degree – there is no punitive damages crisis. (See Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, Wis.L.Rev. 15, 54-55 (1998).)" *Lane v. Hughes Aircraft Co.*, 22 Cal.4th 405, 418 (2000) (Mosk, J. conc.).

rulings and without being strongly aligned with any historical or precedential foundation. The lower courts now must apply federal constitutional "guideposts", which are in the form of "marching orders."[3] *Campbell* at 439 (Ginsburg, J., dissenting). These guideposts were developed for the first time by this Court after hundreds of years of successful punitive damage jurisprudence. They were also developed in the context of quite odd, atypical and uncharacteristic punitive damage cases. None were directed at malicious, fraudulent or oppressive behavior directed on a large scale basis at consumers, individuals or other vulnerable victims.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the fraudulent activity related to the diminution in value of luxury cars. While the conduct was found to be fraudulent, the case is hardly a poster-child for the object of punitive damages. Similarly, in *Campbell*, the trial lasted half a year and yet, this Court found there was *no* evidence of other conduct sufficiently similar to that directed to the plaintiff to support a large punitive damage award. Moreover, the plaintiff in that action had, in fact, been responsible for recklessly causing the death and crippling of others and suffered only the fear of bankruptcy for their actions for a short period of time. These cases are very poor vehicles for the creation of uniform substantive due process guideposts. Indeed, it is likely that these cases rose to this Court's level precisely because of their oddity. In the vast majority of cases, the state courts and lower federal courts have long been well-equipped to resolve the question of whether a punitive damage award is excessive.

In the wake of this Court's intervention into the area on the basis of substantive due process limitations, the lower courts have struggled to make sense out of this

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[3] In *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003), the Court assigned the term "guideposts" an entirely different meaning. There, it merely meant to represent checking points used only to "confirm our conclusion."

Court's pronouncements. In *Romo v. Ford Motor Co.*, 99 Cal.App.4th 1115 (2002), *disapproved in Johnson v. Ford Motor Co.*, 35 Cal.4th 1191, 1205-08 (2005), an exasperated Court tried but could not make sense out of *Campbell*. *Campbell* confirmed that punitive damages served the dual purpose of deterrence and punishment. 538 U.S. at 416. It also declared that it was "obvious" that single-digit ratio's comported more closely with due process than a ratio of 145 to 1 or 500 to 1. *Id.* at 425. This was not obvious to the *Romo* Court. The best it could do was to conclude that by limiting punitive damages to punishment only and eliminate the need for deterrence could the Court recognize this obviousness. *Romo*, 99 Cal.App.4th at 751. But even then, it could only do so "to a certain extent."

> The court found that these multipliers "demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the state's goals of deterrence and retribution. . . . " (*Ibid.*) When considered in light of products liability actions against large corporate defendants for which single-digit multipliers may simply be a cost of doing business (see *Grimshaw*, *supra*, 119 Cal.App.3d at p. 820, 174 Cal.Rptr. 348), the court's conclusion is far from "obvious." However, in the light of the historical goal and measure of punitive damages, the obviousness appears, *to a certain extent*. [footnote]

(*Romo*, 113 Cal.App.4th at 751, emphasis added.)

Campbell itself represents another example of the inability of the lower Courts to decipher the true meaning of this Court's guideposts. The Utah Supreme Court attempted to interpret and apply those guideposts. Four out of the five members of the Utah Supreme Court attempted to apply the *BMW* guideposts and, in so doing, determined that the original jury award satisfied them. This Court, however, found that the case was "neither close nor difficult." *Campbell* at 418.

We briefly review this Court's punitive damage cases. We submit that these cases demonstrate that the Court's

precedents in this area have proven to be short-lived and that the current guideposts are ill-advised and do not accomplish the intended purpose. We suggest that the reason for this is the same reason behind this Court's long-standing reluctance to impose substantive due process guideposts. "[G]uideposts for responsible decisionmakers in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).[4]

As Justice Souter explained in *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998), the Court's substantive due process jurisprudence has addressed legislation and executive action, developing a distinct mode of analysis for each. The Court has no historical or constitutional framework for analyzing the substantive due process claims raised within the judicial branch of government by civil litigants whose liability for punitive damages comports with state law and was imposed under fundamentally fair procedures.

"The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses . . . " *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986). As we explain below, the guideposts applied in *Campbell* and *BMW* amount to the precise type of legislative action against which previous Courts have so carefully cautioned.

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[4] The very phrase "substantive due process" has been called "a contradiction in terms – sort of like 'green pastel redness.'" John Hart Ely, *Democracy And Distrust* 18 (1980).

2. The Court's Previous Punitive Damage Cases Are Conflicting And Confusing.

A. The Procedural Due Process Cases.

This Court entered the due process arena in punitive damage cases in *Pacific Mutual Life Ins. Co., v. Haslip,* 499 U.S. 1 (1990). This case arose out of the state courts of Alabama, the same state which this Court would later revisit in *BMW v. Gore*. Therein, an agent of Pacific Mutual and another insurance company, Union Fidelity Life Insurance Company, agreed to collect premium payments for employees of Roosevelt City, Alabama. He promised to transmit them to Union Fidelity, which had issued a medical policy insuring the City's employees. The agent instead stole the premium payments. Union Fidelity, believing the premiums were unpaid, denied medical benefits to Ms. Haslip and others.

Pacific Mutual then suffered both a compensatory and punitive damage award. Often lost in a discussion of *Haslip* is the fact that Pacific Mutual's liability was based solely on the theory of *respondeat superior*. Pacific Mutual did not issue the pertinent coverage. It did not deny any claims. It did not steal any money. Pacific Mutual was wholly unaware of the misdeeds of its agent, who was purporting to act on behalf of a completely independent insurance company. Nonetheless, under state law, Pacific Mutual suffered an award that was "more than 4 times the amount of compensatory damages [and] . . . more than 200 times the out-of-pocket expenses of respondent." *Id.* at 23. *It was in this context* that the Court wrote its oft-cited passage. "While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety." *Id.* at 23-24.

In most states, however, a punitive damage award under such circumstances would not even be permitted. Conduct far more culpable would be required to support a

punitive damage award.[5] Thus, one can only logically conclude that the award in *Haslip* would have been quite far from the line had, for example, Pacific Mutual itself engaged in the fraudulent conduct. Certainly, the facts in *Haslip* cannot be considered even remotely similar to the conduct at issue here. If a ratio of 4 to 1 was close to the line in *Haslip*, such a ratio must be a far, remote distance from the line here. Comparing the culpability of Pacific Mutual in *Haslip* with the culpability of Philip Morris here is akin to comparing the weight of a weightlifter to that of a toddler. They may both be measured on the same scale, but their weights will be found in far distant places on the scale. Similarly, a ratio that might be meaningful to the conduct of Pacific Mutual in *Haslip* would have no meaning when applied to Philip Morris' conduct here.

The *Haslip* Court, in a carefully written opinion, sets forth reasoning, which this Court apparently abandoned only 5 years later in *BMW*. The Court explained in *Haslip* that proper state procedural standards to review punitive damage awards, "*makes certain* that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." (*Id.* at 21, emphasis added.) Such procedures, the Court found, "*ensures* that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." (499 U.S. at 22, emphasis added.) After carefully reviewing the jury instructions, the Court explained,

> To be sure, the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury "must take into consideration the character and the degree of the wrong as shown by the evidence

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[5] See discussion below at part 3 below.

> and necessity of preventing similar wrong." [Cite omitted.] The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.
>
> These instructions, we believe, reasonably accommodated Pacific Mutual's interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution. The discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish. As long as the discretion is exercised within reasonable constraints, due process is satisfied.

Justice Kennedy, in particular, weighed in with a concurring opinion, which strongly endorsed the principal role of the jury in determining awards of punitive damages, albeit that such awards are very likely to vary from state to state and from jury to jury:

> Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair.
>
> * * *
>
> Our legal tradition is one of progress from fiat to rationality. The evolution of the jury illustrates this principle. From the 13th or 14th century onward, the verdict of the jury found gradual acceptance not as a matter of *ipse dixit*, the basis for verdicts in trials by ordeal which the jury came to displace, but instead because the verdict was based upon rational procedures. See T.

Plucknett, A Concise History of the Common Law 120-131 (5th ed. 1956). Elements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel, the presentation of evidence, and instructions from the trial judge, subject to review by the trial and appellate courts. There is a principled justification too in the composition of the jury, for its representative character permits its verdicts to express the sense of the community.

Some inconsistency of jury results can be expected for at least two reasons. First, the jury is empaneled to act as a decisionmaker in a single case, not as a more permanent body. As a necessary consequence of their case-by-case existence, juries may tend to reach disparate outcomes based on the same instructions. Second, the generality of the instructions may contribute to a certain lack of predictability. The law encompasses standards phrased at varying levels of generality. As with other adjudicators, the jury may be instructed to follow a rule of certain and specific content in order to yield uniformity at the expense of considerations of fairness in the particular case; or, as in this case, the standard can be more abstract and general to give the adjudicator flexibility in resolving the dispute at hand.

These features of the jury system for assessing punitive damages discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity. As we have said in the capital sentencing context: "It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" *McCleskey v. Kemp*, 481 U.S. 279, 311, 107

> S.Ct. 1756, 1777, 95 L.Ed.2d 262 (1987) (quoting H. Kalven & H. Zeisel, The American Jury 498 (1966)).
>
> This is not to say that every award of punitive damages by a jury will satisfy constitutional norms. A verdict returned by a biased or prejudiced jury no doubt violates due process, and *the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case. One must recognize the difficulty of making the showing required to prevail on this theory. . . .*
>
> In my view, the principles mentioned above and the usual protections given by the laws of the particular State must suffice until judges or legislators authorized to do so initiate system-wide change. We do not have the authority, as do judges in some of the States, to alter the rules of the common law respecting the proper standard for awarding punitive damages and the respective roles of the jury and the court in making that determination. Were we sitting as state-court judges, the size and recurring unpredictability of punitive damages awards might be a convincing argument to reconsider those rules or to urge a reexamination by the legislative authority. We are confined in this case, however, to interpreting the Constitution. . . .

(*Haslip*, 499 U.S. at 40-42 [Kennedy, J., concurring], emphasis added.)

The Court next disapproved of a punitive damage award because the state procedural protections were insufficient. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). The Court then strengthened the procedural protections already considered sufficient under state law by demanding an exacting de novo judicial review. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

Then in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (cited with approval in *Campbell*), the Court again revisited the due process aspects of

punitive damages. In *TXO*, a purchaser of mineral rights intentionally raised false claims of defective title to the property held by the seller in order to renegotiate its purchase at a lower price. The jury awarded the sellers $19,000 and punitive damages of $10,000,000. This was a ratio of 526 to 1. However, the Court noted that by considering the potential harm that would have occurred if defendant had succeeded in its illicit scheme, the ratio could be considered to be as low as 10 to 1. The Court concluded that the ratio was not so large as to render the award unconstitutional. (*TXO*, 509 U.S. at 460-62.)

The plurality explained, "[a]ssuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable." 509 U.S. at 457.

Justice Kennedy again wrote a lengthy concurrence. Significantly, he insisted that it was improper to consider the ratio as 10 to 1. Instead, he maintained that the Court must consider the validity of the award as if the ratio was 526 to 1. Even with that ratio, he approved of the award:

> As I have suggested before, [cite omitted] a more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so. *The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions. . . .*
>
> The plurality suggests that the jury in this case acted in conformance with these standards of rationality in large part on the basis of what it perceives to be the rational relation between the size of the award and the degree of harm threatened by TXO's conduct. . . . I do not agree that this provides a constitutionally adequate foundation for concluding that the punitive damages verdict against TXO was rational. It is a commonplace

> that a jury verdict must be reviewed in relation to the record before it. . . .
>
> *There is, however, another explanation for the jury verdict, one supported by the record and relied upon by the state courts, that persuades me that I cannot say with sufficient confidence that the award was unjustified or improper on this record: TXO acted with malice. This was not a case of negligence, strict liability, or respondeat superior.* TXO was found to have committed, through its senior officers, the intentional tort of slander of title. The evidence at trial demonstrated that it acted, in the West Virginia Supreme Court's words, through a "pattern and practice of fraud, trickery and deceit" and employed "unsavory and malicious practices" in the course of its business dealings with respondent. 187 W.Va. 457, 477, 467, 419 S.E.2d 870, 890, 880 (1992). "[T]he record shows that this was not an isolated incident on TXO's part – a mere excess of zeal by poorly supervised, low level employees – but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power." *Id.*, at 468, 419 S.E.2d, at 881.

(*TXO*, 509 U.S. at 466-470 [Kennedy, J., concurring].)

B. The Substantive Due Process Cases.

The Court then issued its decision in *BMW v. Gore* only three years later. The Court's opinion in that case ran head-on into its and Justice Kennedy's opinions in *Haslip* and *TXO*. *BMW*, like *Haslip*, arose out of the Alabama state courts. The same state court procedures found to be sufficient in *Haslip* were now apparently insufficient – even though the Alabama Supreme Court reduced the verdict, just as those procedures were designed to accomplish. Indeed, the error which the Alabama Supreme Court relied on was the same error carefully explained by this Court – that the verdict punished BMW for conduct that was lawful in other states. Still, this Court found the

award improper and applied three guideposts to determine if the award passed due process muster.

But *Gore* was an extraordinarily unique case for three fundamental reasons. First, the reprehensibility was very low. The dispute here was not the kind of dispute for which punitive damages were intended. Under no circumstances could *Gore* possibly be considered similar to the present case. While both involved damages called "punitive damages", the facts and circumstances of these two cases could not be much farther apart. If anything, these two cases disclose the wide variety of facts, procedures and circumstances where punitive damages might come into play. To apply the same procedures or guideposts that may have been relevant in *Gore* to the facts here is simply illogical.

Second, the case involved conduct which was wholly proper in other states. Other states had, in fact, specifically adopted regulations permitting BMW's conduct. It is unlikely that any of Philip Morris' conduct here could be considered proper in other states.

Third, the *Gore* verdict contained an element which is almost never present. The Court was able to conclude based solely on the amount of the verdict that the amount of the verdict was based on conduct which was legal elsewhere. As Philip Morris concedes, the occasions when an appellate court can determine the basis upon which a jury arrived at a punitive damage award are nearly nonexistent. (Brief for Pet. at 22.) This Court found the basis apparent in *BMW* only because of the direct relationship between the award and the evidence of other incidences, together with counsel's argument. But courts are rarely provided such clarity, nor is it desired. Doing so in most instances is in direct contravention to the sanctity of the jury's deliberations. It was only because of these unique circumstances that the Court was able to make a determination that the award was improperly based on conduct which was entirely proper.

Because of the uniqueness of *BMW*, it is a poor vehicle to attempt to carve out guidelines by which to judge the substantive due process of other awards.

Finally, this Court issued *Campbell* in 2003. Again, the facts there are incomparable to the facts here. Remarkably, *Campbell* simply casts aside carefully reasoned holdings of this Court's prior opinions. In *Haslip, TXO* and *Cooper*, the Court all but announced that punitive awards were constitutional where adequate procedural safeguards were applied, including appellate review. Yet, in *Campbell*, the Court simply referenced "vague instructions or those that merely inform the jury to avoid 'passion and prejudice' [cite] do little to aid the decisionmaker in its task . . . " There was no reference to the precise instructions to which the Court referred. We assume they were no less vague than the instructions in *Haslip* where this Court said that punitive damage jury instructions were "enlightening", ensured a constitutional award and "reasonably accommodated Pacific Mutual's interest in rational decisionmaking . . . " Also bulldozed was the Court's declaration in *TXO*, that adequate procedures, including proper jury instructions carried with them a nearly irrebuttable presumption that the award was valid.

In *TXO*, the Court also made clear that when addressing the punitive damage to harm ratio factor, "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *TXO* at 460. In *Campbell*, however, the Court retracted this statement, limiting the evaluation to only potential harm to the plaintiff. *Campbell* at 409.

In both *BMW* and *Haslip*, the Court, when discussing the third guidepost, specifically included reference to comparable civil and criminal statutes. *BMW* at 583; *Haslip* at 23. This guidepost had been adopted by the Court in response to Justice O'Connor's concurring and dissenting opinion in *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989). She specifically included criminal statutes among those legislative actions which should be considered.

> . . . [B]ecause punitive damages are penal in nature, the court should compare the civil and criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil and criminal penalties imposed by different jurisdictions for the same or similar conduct. In identifying the relevant civil penalties, the court should consider not only the amount of awards of punitive damages but also statutory civil sanctions. In identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions, but also any possible prison term.

In *Campbell*, the Court again retracted its earlier statement in *BMW* and limited comparable statutes to only civil statutes. *Campbell* at 428. As we discuss below, legislative choices relating only to civil statutes provide no basis to suggest that the legislature intended punitive damages to be limited in any way.

Campbell, citing from *Honda*, admonished that punitive damages posed an acute danger of arbitrary deprivation of property. *Id.* at 417. While *Honda* most certainly recognized this principle, it also explained that adequate state procedures, including judicial review, safeguarded against this danger. 512 U.S. at 432.

Eschewing any reference to whatever procedural due process may have been present in Utah, the Court's decision was based entirely on substantive due process. In so doing, it left the question of what significance then are the procedural due process requirements of *Haslip* and *TXO*?

The Court then set forth and discussed the three guideposts, reprehensibility, ratio and similar punishments, it first articulated in *BMW*. But these guideposts in many instances do not embrace logic well and, in other instances, are so vague as to leave the lower courts scratching their heads over their meaning. They also smack head on into Justice Kennedy's remarks in *Haslip* that the Court has no such authority to wander into the

legislative arena and his remarks in *TXO* that a ratio has no place in the substantive due process analysis.

The Court explained that reprehensibility was the most important factor. 538 U.S. at 419. It then noted that it refused to set a bright line test for the ratio factor, but "in practice" only rarely will an award be constitutional where it is significantly greater than single digits.[6] *Id.* at 425.

In reality, however, the lower courts have interpreted *Campbell* in a manner which does not reflect Court's language. "In practice", the reprehensibility factor is no longer the most important indicium of the reasonableness of a punitive damage award. The ratio is. Notwithstanding the Court's careful language, the lower courts have imposed a bright line test for a punitive to compensatory ratio, with the only exception being for small or nominal damages. In a nutshell, the lower courts have nearly uniformly reviewed punitive damages based on the following interpretation of *Campbell*: Punitive damages may not exceed a ratio of 9 or 10 to 1 unless the compensatory damages are nominal. The precise ratio between 1 and 10 is then determined by the reprehensibility of the conduct. The third factor, comparing the award to similar civil remedies is essentially ignored for the simple reason that it is impossible to compare a civil penalty to a punitive damage award.[7] Thus, the *Campbell* rule is that (with minor exceptions) punitive damages are capped at a ratio to the harm of 10 to 1.

Reprehensibility has been relegated to nothing more than the "threshold" that must be passed, before punitive

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[6] As we discuss below, the lower courts have consistently misinterpreted this court's language to refer to single digits ratio's instead of ratio's in excess of single digits "to a significant degree."

[7] See e.g. *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824 (8th Cir. 2004); *Conseco Finance Servicing Corp. v. North American Mortgage Co.*, 381 F.3d 811 (8th Cir. 2004); *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717 (7th Cir. 2004); *Campbell v. State Farm Mut. Auto Ins. Co.*, 98 P.3d 409, 418 (Utah, 2004); *McClain v. Metabolife Intern., Inc.*, 259 F.Supp.2d 1225 (N.D.Ala. 2003).

damages can be awarded in the first instance. Once that threshold is passed, the mathematical ratio between compensatory and punitive damages becomes the constitutional ruler against which the amount of the punitive award must be measured. Reprehensibility's only remaining relevance then is to determine where to peg the precise ratio on the scale of 1 to 9. This is how all lower courts have interpreted *Campbell*.

This too butts heads with the plurality in *TXO*, which insisted that the ratio is not controlling. 509 U.S. at 462. Many other authorities consider the ratio factor the least important factor. See e.g., *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.,* 189 Cal.App.3d 1072, 1098 (1987); *Betts v. Allstate Ins. Co.,* 154 Cal.App.3d 688, 711-12 (1984).

This *Campbell* rule defies all logic. If, for example, a plaintiff receives compensatory damages of $1 million under the circumstances of *Campbell*, the maximum punitive damage award would be $10,000,000. Similarly, were one to lose merely $19,000 under the circumstances of *TXO*, which was a business dispute, the maximum award is the same $10,000,000. If the plaintiff in circumstances such as those now before the Court were to suffer $1 million in harm, the maximum award is again $10,000,000. Yet the reprehensibility of the conduct in these instances is worlds apart, as is, presumably, the size of the defendant. The deliberate sustained and continued effort to mislead the public about the risks of death and disease from tobacco is hardly comparable to a single instance of insurance bad faith or the deliberate attempt to defraud a landowner out of his rights. Which conduct would justify a greater punishment and which conduct would justify a greater need for deterrence? Clearly, the tobacco conduct is far more reprehensible, touching tens of millions of lives than a dispute involving claims of fraud by one company against another company. Yet, under the *Campbell* rule, the constitutional maximums are identical.

Worse yet, the award in the tobacco case will have no deterrent effect regardless of where it lay on the single-digit scale. There is no significant difference to Philip

Morris between a $1 million punitive damage award and a $10 million award. Neither amounts to a hill of beans to Philip Morris.

The single-digit standard also removes the element of deterrence, which at base, is the most important aspect of punitive damages. This Court continues to recognize this important element. We note, however, that throughout petitioner's brief, it only uses the word punishment when referencing punitive damages. Deterrence is never referenced. However, the lower courts cannot square the single-digit rule with punitive damages' deterrence role. As we noted above, the Court in *Romo v. Ford*, *supra*, interpreted *Campbell* as saying that a reasonable relationship cap between punitive damages and compensatory damages is logical only if the "goal of punitive damages is not to disable the defendant from continuing the course of conduct, but instead to punish the defendant for the outrage committed against the plaintiff." *Romo* at 751. The California Supreme Court was also forced to concede that, under *Campbell*, the level of deterrence may be limited and "the state may have to partly yield its goals of punishment and deterrence to the federal requirement that an award stay within the limits of due process." *Simon v. San Paolo U.S. Holding Co., Inc.* 35 Cal.4th 1159, 1187 (2005).

We also note that the Court supported its analysis by reference to a variety of legislation commonly imposing damages of 2 or 3 times the harm. We submit, however, that this supports a claim for much greater ratio's rather than the suggestion that punitive damages should approach those legislatively imposed ratio's. California Supreme Court Justice Mosk directly addressed this issue in *Lane v. Hughes Aircraft Co.,* 22 Cal.4th 405, 420 (2000) (Mosk, J., concurring.)

> The Legislature has in many statutes provided for punitive damages *without* double or treble limitation, or in fact any limitation. Of course, Civil Code section 3294, the statute generally authorizing punitive damages in noncontract cases,

> is the most significant example of such a statute. But there are many others as well [citations omitted.] Yet other statutes specify that no punitive damages are to be awarded [citations omitted.] Indeed, my research reveals that there are over 150 California statutes that address punitive or exemplary damages. Taking the concurring opinion's figure that double and treble damages are used in "more than 30 instances" (conc. opn. of Brown, J., *post* . . .), we must conclude that the Legislature has used double or treble damages as a limit on punitive damages in a *small minority* of the statutes in which it has chosen to address punitive damages.
>
> Thus, the generalization that "the Legislature has selected compensatory damages as the best . . . metric for calibrating the punitive component of a damages award" (conc. opn. of Brown, J., *post*, 93 Cal.Rptr.2d at p. 75, 993 P.2d at p. 401) is simply inaccurate. Rather, all we can safely generalize, after observing the entire patchwork of punitive damages statutes, is that the Legislature has enacted a number of statutes containing a variety of responses to punitive damages, some providing double damages, some treble damages, some providing monetary caps, some prohibiting punitive damages altogether, and many statutes permitting punitive damages without limitation. The unmistakable inference to be drawn from this patchwork is that the Legislature knew how to limit punitive damages as a multiple of compensatory damages, and in many instances, including the statute broadest in scope, *Civil Code section 3294*, declined to do so.

The most troubling aspect of the single-digit rule is that it creates unfairness and, in fact, due process violations themselves by treating parties differently in important respects. If punitive damage awards are limited to single-digit multipliers, then in situations where large

corporate defendants have engaged in such conduct, it would be nearly impossible to find an award that is large enough to deter. In fact, in most instances, single-digit multipliers will *encourage* unlawful behavior because such defendants will quickly realize that punitive damages are merely a cost of doing business, and as such they will likely conclude that it is more profitable to just price the cost into its product. And where competitors see that it is profitable to defraud consumers, even if caught, they too will be induced, if not forced, to engage in similar conduct in order to compete.

Single-digit ratios may well accomplish the states' legitimate goals of deterrence in certain, and perhaps many, cases. Manifestly, it will not do so in others. If we take, for example, a multi-billion dollar insurance company which is engaged in intentionally and systematically depriving insureds of disability insurance benefits for the sole purpose of slashing reserves and increasing profits, single-digit ratios are wholly ineffective. Even if the benefits denied were $1 million, a $5 million (or middle single-digit multiplier) would have no deterrent effect on such a large corporation.

More alarming is the fact that the single-digit ratio rules provide far more punishment and deterrence for small defendants than they do for large defendants and therefore treat defendants unfairly and unequally. For example, a damage award of $50,000 and a punitive award of $200,000 (4 to 1 ratio) may be effective in deterring conduct of a $1 million or even a $10 million company. But it will have no deterrent effect at all on a $100 million or $1 billion company. For the former, it may really hurt and serve both as an effective punishment and deterrence. To the latter, it is simply written off as a cost of doing business. Thus, the "single-digit" cap would convert a test whose very purpose is to inject rationality

into the measurement of punitive damage awards into an arbitrary and unworkable standard.[8]

3. The Single-Digit Cap is Unnecessary and Arbitrary.

The nub of *Campbell* is that it imposes a single-digit test on top of any and all state procedures designed to assure a fair punitive damage award. Ironically, in an effort to stamp out arbitrary awards, the Court has arbitrarily picked 10 as the highest ratio above which most ratio's should not exceed. As we noted above, this number is untethered to any historical or precedential foundation. More importantly, it is wholly unnecessary. We offer California as an example.[9]

Punitive Damages may not be awarded unless a jury determines by clear and convincing evidence that the defendant acted with malice, fraud or oppression. The clear and convincing evidence jury instruction provides "Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means

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[8] It has been suggested that the rule is fair because larger companies will suffer more punitive awards than smaller companies. This, of course, is not true in practice because, as the Court said in *TXO*, no two cases are alike. *TXO*, 509 U.S. at 457. It also assumes that all of the defendant's activities are the activities in question. It may, in fact, be a small or large part of the defendant's activities as compared with small or large part of a smaller company's activities.

Worse yet, it permits defendants to suffer punitive damage awards and continue to claim their conduct was proper in other cases. The punitive award should be sufficient to effectuate deterrence. This is accomplished by permitting the defendant to introduce evidence of other awards so that the jury can assess whether the defendant has been deterred. See *Boeken v. Philip Morris, Inc., supra*, 122 Cal.App.4th 684, 741-42 (2004), citing *Stevens v. Owens-Corning Fiberglas Corp.*, 49 Cal.App.4th 1645, 1661 (1996) [defendant can avoid duplicative punitive awards by advising the jury of past awards and its response thereto].)

[9] We do not suggest that the law in other states should not be examined. We merely use California as an example of how the states are more than capable of protecting against unconstitutional awards.

the party must persuade you that it is highly probable that the fact is true." CACI Jury Inst. No. 201. Malice, fraud and oppression are statutorily defined as follows: (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. Cal. Civ. Code §3294. Despicable conduct in turn is defined as, "conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people." CACI 3940.

"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. Cal. Civ. Code §3294.

In addition, a defendant has a right to a protective order precluding any financial evidence until a prima facie case of punitive conduct is made. Cal. Civ. Code §3295. A party may not obtain any discovery of a defendant's financial status without an adequate showing of potential punitive conduct (*Id.*) and any defendant has the right to demand a bifurcation of the trial such that no evidence of its wealth is admissible unless and until the jury has actually found by clear and convincing evidence that the defendant has acted with malice, fraud or oppression. (*Id.*)

The jury is also required to be told that in determining the amount of punitive damages, the jury must consider three factors (1) the reprehensibility of the defendant's conduct, (2) that the punitive damages must bear a reasonable relationship to the compensatory harm, and (3) the wealth of the defendant. (*Neal v. Farmers Insurance Exchange,* 21 Cal.3d 910, 928 (1978); Civ. Code §3295.)

> Although there is no fixed ratio by which to determine the propriety of a punitive damage award, there is law to the effect that punitive

> damages should bear a reasonable relationship to the compensatory damages award. . . .
>
> We have said that "In considering whether the [award was] excessive, we realize the very familiar rule that to the jury, to a very large extent, is committed the responsibility of awarding compensation for an injury sustained. When the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice, the duty is then imposed upon the reviewing court to act."

Neal, supra at 937 (Richardson, J., dissenting).

Campbell explained that due process required that the Courts "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." (538 U.S. at 426.) California juries and appellate courts have been assessing the propriety of punitive damage awards for decades, including an examination of whether the ratio was a reasonable ratio and an examination of the reprehensibility of the conduct. California courts have been evaluating and assessing ratios for decades with one purpose in mind – assuring that punitive awards are both reasonable and proportional. (See, e.g., *Neal*, 21 Cal.3d at 928 ["in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small"]; CACI 3940 ["Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm?"]; BAJI 14.71 ["the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff"].) California appellate decisions have continually declined to allow unlimited ratios and instead have carefully scrutinized punitive damage awards under a "reasonable" ratio analysis, while ensuring that punitive damage awards retain a deterrent effect.

Thus, *Campbell* effectively adds only one thing to California punitive damage jurisprudence – that a reasonable ratio cannot ordinarily exceed 10 – 1. This arbitrary cap is contrary to decades of decisions by hundreds of California judges and juries, all of whom have been charged with the same question – *i.e.*, what is a reasonable ratio? The Court, in one broad swoop, has not only determined that all of these prior awards were unreasonable, but that they were grossly unreasonable, arbitrary[10] and "jar one's Constitutional sensibilities." *Haslip*, 499 U.S. at 18. Undoubtedly, this comes as quite a shock to the many courts and juries which found otherwise.

The Court has strongly endorsed the states' fundamental and individual interest in using punitive damages to deter wrongful conduct that injures its residents. The federal constitution continues to respect the states' individual interests in achieving their legitimate goals of "deterrence and retribution." (*Campbell*, 538 U.S. at 416 ["punitive damages ... are aimed at deterrence and retribution"], citing *Cooper*, 532 U.S. at 432; *BMW*, 517 U.S. at 568 ["Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); *Haslip*, 499 U.S. at 19 ["punitive damages are imposed for purposes of retribution and deterrence"].)

California has declared that punitive damages are especially important in the deterrence of objectionable corporate policies.

> One of this state's principal purposes in permitting punitive damages is the deterrence of "'objectionable corporate policies'" when "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and

[10] "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." (*BMW*, 517 U.S. at 568.)

> distribution of defective products. [Citations.]" (*Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 810, 174 Cal.Rptr. 348 (1981) (*Grimshaw*); see *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 820, 169 Cal. Rptr. 691, 620 P.2d 141 (1979).)
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> "Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles." (*Grimshaw*, *supra*, 119 Cal.App.3d at p. 810, italics added.) A larger award may be necessary for this purpose, where reprehensible conduct has "exhibited a conscious and callous disregard of public safety in order to maximize corporate profits," and has endangered the lives of thousands. (*Id.* at p. 819.)

Boeken v. Philip Morris, Inc., 122 Cal.App.4th 684, 739-40 (2004).

"Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." (*TXO*, 509 U.S. at 457.) Nonetheless, punitive damages in California have been most commonly assessed in cases where a showing has been made of a continuous wrongful course of conduct or where there is an established policy of being harmful to victims. *Tomaselli v. Transamerica Ins. Co.*, 25 Cal.App.4th 1269, 1287 (1994); *Mock v. Michigan Millers Mutual Ins. Co.*, 4 Cal.App.4th 306, 329 (1992).

The California system for awarding punitive damages is, therefore, very strict and very well controlled and the Courts are well versed in seeing to it that such awards are consistent with the proper purpose of punitive damages. In addition to the state procedures, the courts must conduct the federal requirement of an exacting de novo review. Why isn't this sufficient to satisfy any due process concerns defendants may have? Why is it necessary to superimpose on top of everything else a "one-size-fits-all" cap regardless of the circumstances? What purpose is served by simply capping these awards and why is 10 to 1 the chosen cap? Certainly, it makes little sense to relegate the reprehensibility factor to simply pegging the precise ratio

somewhere between 1 to 1 and 10 to 1. All cases in which punitive damages are awarded must, by definition involve highly reprehensible conduct and this conduct must be supported by clear and convincing evidence. Thus, all cases would tend to justify the highest rating of 10 to 1 or near to it. See *Simon v. San Paolo U.S. Holding Co., Inc.* 35 Cal.4th at 1189 (finding a ratio of 10 to 1 even though reprehensibility was low.)

In sum then, *Campbell* holds, in effect, that, in California, punitive damage cases shall ordinarily be a ratio of 10 to 1 because that is the highest ratio permitted and all punitive damage cases are highly reprehensible, thereby justifying the highest permissible ratio. Clearly, under *Campbell*, the ratio becomes the defining punitive damage factor.

This makes no sense.

4. The Five Sub-Factors Of Reprehensibility Are Confusing.

The same lack of common sense instructs us on the five sub-factors under the reprehensibility scale. These factors were described by the Court as (1) "the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. . . ." (538 U.S. at 419.)

The Court merely lists the factors without any guidance as to how to apply them. Application of these factors, however, is confusing and inexplicable. The first factor elevates physical harm over economic harm and appears to leave out emotional harm entirely. This is confusing because emotional harm can often far exceed physical harm. Compare, for example, a mother who witnesses the death of a child is certainly as aggrieved as an individual who suffered bodily harm. Similarly, economic disaster can lead to emotional harm and consequences that can far

exceed bodily injury. It is also unclear why physical harm is elevated above economic harm in the first factor when the third factor is the victim's financial vulnerability. Assuming the victim had financial vulnerability, economic harm is to be expected. In this regard, the first and third factors appear contradictory.

The second factor references conduct which is directed to the health and safety of others. This is repetitive of the first factor, as the natural result of endangering one's health and safety is to cause physical harm. It is also unclear why the Court did not reference a reckless indifference to one's rights. See e.g. *TXO,* in which the conduct involved only a business dispute.

The second factor also references "indifference to or reckless disregard". But this is repetitive of the fifth subfactor – whether the conduct was an accident or involved intentional malice, trickery or deceit. If the conduct constituted intentional malice directed towards physical harm, it undoubtedly constitutes a reckless disregard for the health or safety of others. Moreover, in many states, such as California, the fifth and second factors are irrelevant because malicious, oppressive or fraudulent conduct is required for punitive damages. Thus, how are courts in California supposed to evaluate these factors?

Manifestly, we submit, juries and judges have long been well aware and are familiar with how to assess the reprehensibility of a party's actions. Naturally included in that assessment are the nature of the harm and vulnerability of the plaintiff in the assessment. That analysis has been thoroughly accomplished for many years under state law. The Court's five sub-factors add nothing substantive to the analysis.

5. The Lower Courts Have Uniformly Misinterpreted *Campbell.*

While the lower courts have uniformly adopted a single-digit rule from *Campbell*, that is not what the Court said. The Court actually said, "Our jurisprudence and the principles it has now established demonstrate, however,

that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, **to a significant degree**, will satisfy due process." (538 U.S. at 425, emphasis added.) This is clearly different than if this Court had said that few awards exceeding single digits will satisfy due process. Thus, the actual language of *Campbell* states that the Court fully expects that the ratio will exceed single digits. However, it does not expect the ratio to exceed single digits "to a significant degree." We must assume that the Court intended that ratio's higher than single digits were expected to be commonplace. Otherwise, it would not have added the important phrase "to a significant degree."

Other language in *Campbell* has also gone unexplained. The Court said, "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 [cite omitted] or, in this case, of 145 to 1." (123 U.S. at 425.) The Court thus clearly stated in *Campbell* that ratios *closer* to single digits are more likely to be constitutionally appropriate *than* a ratio of 500 (*BMW*) or 145 (*Campbell*) to 1. This is a far cry from stating that only single digit ratios are acceptable. Indeed, it is apparent that in many instances, single digits do not serve the State's "goals of deterrence and retribution". *Campbell* then went on to state that "ratios greater than those *we have previously upheld* may [only] comport with due process" in certain limited circumstances. (123 S.Ct. at 1524, emphasis added.) This raises the question of how to interpret the results in *TXO*, the most recent case in which this Court upheld punitive damages. *Campbell*'s author, Justice Kennedy, made clear that he considered the ratio in *TXO* to be 526 to 1. Are we to presume that the above language from *Campbell* was intended to give lower courts very broad, general guidelines about what "a significant degree" beyond single digits may be, knowing that states and cases differ so dramatically that the functions of deterrence cannot be confined simply to a small box of single-digit ratios? Are we to presume that Justice Kennedy was referring to the 526 to

1 ratio of his concurring opinion or the 10 to 1 ratio of the plurality?

We submit that, however the Court rules in this matter, that its intent in *Campbell* be made clear. If, indeed, the Court intended the ratio to cap punitive damages in most cases at a single-digit ratio, we urge the Court to make that clear. If, instead, *Campbell* intended to provide the lower courts more flexibility than that, this should be made clear. In point of fact, a single-digit rule now exists. Litigants and parties need to know if this is this Court's position. If not, the lower courts have repeatedly misinterpreted *Campbell* and are in desperate need of clarification.

CONCLUSION: JUSTICES SCALIA, THOMAS AND GINSBURG ARE CORRECT

Justices Scalia, Thomas and Ginsburg have repeatedly made known their view that the Court should not be setting substantive due process standards for punitive damage cases. It is rare to read that a Justice of the Supreme Court has found an opinion so lacking in substance that he cannot give it *stare decisis* effect. Justice Scalia is not the only judge having trouble trying to make sense of *Campbell*. As we noted, other courts have been at a complete loss as well. It is certainly fair to say that, if Justice Scalia finds *Campbell* unsusceptible of principled application, other courts are certain to suffer the same confusion.

Reviewing the Court's journey through punitive damages reflects the frustrations of a chef looking for the perfect recipe. When his customers don't appreciate the first batch, he keeps experimenting, always hoping the next batch will prove to be it. Unfortunately, it is no way to run a restaurant or the Supreme Court.

Given the power, prestige, and responsibilities of the Supreme Court, is it not fair to ask difficult questions? How are we to respond when the Court holds that the procedures of a State make certain and ensure that a

verdict satisfies due process but then five years later finds that it did not? How do we address state and federal judges that have carefully balanced the ratios between punitive and compensatory damages for decades to make sure that the ratio's are reasonable and proportionate, only to find out later that the due process clause of the United States Constitution contains within it a numerical limit of 10 to that ratio? The due process clause protects only against judgments that shock the conscience or are too far out of scale as to be considered grossly unreasonable. Given the fact that judges for decades have found ratio's in excess of single digits to be fair and reasonable on innumerable occasions, how is it that, all of a sudden, a ratio of 15 to 1 now is presumed to shock the conscience?

How is it that a justice can assure us that the Supreme Court has no ability to create substantive due process standards in this area and that ratio's have no relevance, yet hold only 13 years later that ratio's are not only important but that they cannot exceed the arbitrary number of 10? How is it that the Court in *Campbell* can simply cast aside so many recent holdings? In short, how are we to view, follow and respect the opinions of a Court whose opinions are so facile?

We submit that it is not the Court, but the topic, which has led to so much confusion. Substantive due process simply cannot be applied through a one-size-fits-all formula and certainly a ratio limit of 10 is no less arbitrary than the awards which this Court has sought to reverse. The best that can be done is to leave the lower courts to resolve these cases as they have – within principled due process procedures and based on the individual circumstances of each case. Anything further must be left to the appropriate legislative bodies. Anything else simply turns this Court into a 9-member legislature attempting to solve problems that are not susceptible of resolution based on substantive due process.

Respectfully submitted,

ARNOLD R. LEVINSON, ESQ.
Counsel of Record
PILLSBURY & LEVINSON, LLP
The Transamerica Pyramid
600 Montgomery Street, 31st Floor
San Francisco, CA 94111
Telephone: 415/433-8000

AMY R. BACH
Of Counsel
BACH LAW OFFICE
42 Miller Avenue
Mill Valley, CA 94941
Telephone: 415/381-7627

Counsel for Amicus Curiae

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Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

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FREDERICK M. BARON, ESQ.*
BARON & BUDD, P.C.
5956 Sherry Lane, Ste. 1616
Dallas, TX 75225
(214) 265-4400

**Counsel of Record*

PERRY WEITZ, ESQ.
WEITZ & LUXENBERG, P.C.
180 Maiden Lane, 17th Fl.
New York, NY 10038-1850
(212) 558-5508

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are university professors or scholars holding senior positions at independent research institutions. Each amicus has conducted or reviewed empirical research on juries, punitive damages, or both. The interest of the amici in this case is to provide the Court with an accurate summary of empirical research about jury behavior and competence relating to punitive damages. Short biographies of each amicus are provided in Appendix A.[1]

SUMMARY OF ARGUMENT

Critics of punitive damages have argued that civil jury punitive awards are haphazard and based on biases against large corporations, that the frequency of awards has increased, and that the amounts awarded have increased. They have also asserted that the ratio between punitive and compensatory damages is out of step with guidelines set by this Court, especially in cases involving very large punitive awards. Moreover, often implicitly and sometimes explicitly, critics argue that trial courts and appellate courts do not adequately exercise their powers to control inappropriate punitive awards.

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[1] Pursuant to this Court's Rule 37, amici state that blanket letters of consent from both parties have been filed with the Clerk of the Court, and pursuant to Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and their counsel, made a monetary contribution to its preparation and submission. Amici are grateful to Duke University School of Law students Brian D. Hurley, Jennifer L. McGinnis, Matthew W. Wolfe, and Jennifer A. Zimbroff for their invaluable contributions to this brief.

Over the last twenty-five years researchers from government organizations, universities and prestigious research institutions have conducted empirical research bearing on these various claims. The studies overwhelmingly indicate that, contrary to the claims that these critics make, civil juries perform rationally and reasonably.

The research has found that: (1) juries award punitive damages infrequently; (2) punitive damages awards have not increased in frequency; (3) when adjustments are made for inflation the magnitude of such awards has not increased over the past several decades; (4) most awards are modest in size; (5) the overwhelming majority of awards show a rational proportionality between actual and potential harm caused by defendants; (6) the same proportionality relationship between compensatory and punitive damages exists in cases involving large punitive awards; (7) juries pay particular attention to the reprehensibility of defendants' conduct; (8) jury decision-making processes in punitive damages cases are similar to the decision-making processes used by judges in bench trials of such cases; (9) the amounts of punitive awards rendered by juries and judges are similar when adjustments are made for case types; (10) little evidence indicates that juries are biased against large businesses; (11) judges effectively exercise supervision over punitive damages in post-verdict motions or on appeal; and (12) in other instances post-verdict settlements reduce or abandon punitive awards without judicial intervention.

These empirical findings strongly undermine the Petitioner's premise that additional due process limits in

punitive damages cases are needed. Jury decision-making comports with the criteria that this Court has enunciated in *State Farm Mut. Auto Ins. Co. v. Campbell*[2] and other leading cases.

ARGUMENT

I. Juries Perform Rationally and According to Legal Principles When Assigning Punitive Damages.

This Court has outlined three criteria that should guide decision-making about punitive damages. *State Farm Mut. Auto Ins. Co. v. Campbell* states that "'[T]he most important indicium of the reasonableness of punitive damages is the degree of reprehensibility of the defendant's conduct.'"[3] Elaborating further, this Court said:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[4]

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[2] *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

[3] *Id.* at 420 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

[4] *Id.*

The second criterion is the relationship between compensatory and punitive damages. Although there can be "no bright-line ratio," few awards exceeding a single digit ratio will satisfy due process.[5] The third criterion involves the relationship between the punitive damages and civil penalties authorized or imposed in comparable cases that might be subject to criminal penalties. This brief addresses only the first two criteria since the third criterion involves legal judgment beyond the purview of jury decisions.

Twenty-five years of empirical research lead to the conclusion that, with rare individual exceptions, jury behavior is consistent with this Court's criteria. Punitive damages are rendered in only a small percentage of cases, mostly for intentional torts and fraud; the frequency and amounts of punitive damage awards have not changed over the past several decades; punitive to compensatory ratios are typically modest; juries and trial judges decide punitives using similar criteria, putting especial emphasis on the reprehensibility of the defendant's behavior.

A. Juries Rarely Award Punitive Damages.

The "Civil Justice Survey of State Courts," a joint project of the U.S. Department of Justice's Bureau of Justice Statistics and the National Center for State Courts systematically collected data directly from clerks' offices in

[5] *State Farm*, 538 U.S. at 426. *See also Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (upholding a punitive damages award "more than 4 times the amount of compensatory damages [and] more than 200 times the out-of-pocket expenses of" the plaintiff).

forty-six state courts of general jurisdiction covering three periods: 1991-92, 1996, and 2001.[6] These data sets are representative of the seventy-five most populous counties in the United States. The Bureau of Justice Statistics findings lead to the estimate that punitive damages are awarded in less than one percent of all civil actions commenced during each of these three periods.[7] In 2001 juries awarded punitive damages in only 5.7 percent of tort and contract cases when the plaintiff prevailed at trial.[8]

Eaton et al. recently reviewed a number of databases to conclude that "for every 1000 tort claims filed, typically only 50 or more are resolved by trial, only 25 produce trial

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[6] Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties*, Bureau of Justice Statistics Special Report NCJ 154346 (July 1995) [hereinafter "Bureau of Justice Statistics July 1995"]; Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 1996: Civil Trial Cases and Verdicts in Large Counties, 1996*, Bureau of Justice Statistics Bulletin, NCJ 173426 (Sept. 1999) [hereinafter "Bureau of Justice Statistics September 1999"]; Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2001: Civil Trial Cases and Verdicts in Large Counties, 2001*, NCJ 202803 (Apr. 2004) [hereinafter "Bureau of Justice Statistics April 2004"]; Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2001: Tort Trials and Verdicts in Large Counties, 2001*, NCJ 206240 (Nov. 2004) [hereinafter "Bureau of Justice Statistics November 2004"]; Bureau of Justice Statistics, U.S. Dept. Of Justice, *Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001*, NCJ 208445 (Mar. 2005) [hereinafter "Bureau of Justice Statistics March 2005"].

[7] *See* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996 and 2001 Data*, 3 J. Empirical Legal Stud. 263, 268 (2006) ("[A]pplying any realistic rate of filed cases reaching trial, less than 1 percent of civil actions formally commenced resulted in the awarding of punitive damages.").

[8] Bureau of Justice Statistics April 2004, *supra* note 7, at 3 tbl.2.

outcomes favorable to the plaintiff, and only 1.25 [of 1000] have a punitive damage award."[9]

In 1998 Professor Michael Rustad reviewed nine major empirical studies of punitive damage awards conducted up to that time.[10] The combined data from these studies reached as far back as 1960 and covered most geographical areas of the United States. The various studies were conducted by the United States General Accounting Office ("GAO"),[11] by prestigious, non-partisan research institutions (the American Bar Foundation;[12] the RAND Institute of Civil Justice ("RAND")),[13] by Professor William Landes and Judge Richard Posner,[14] and by

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[9] Thomas Eaton et al., *The Effects of Seeking Punitive Damages on the Processing of Tort Claims*, 34 J. Legal Stud. 344, 345 (2005).

[10] Michael Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wisc. L. Rev. 15, 17–19 (1998).

[11] U.S. General Accounting Office, *Product Liability Verdicts and Case Resolution in Five States*, GAO/HRD-89-90, at 24, 29 (Sept. 1989) (Punitive damages were awarded in 23 of 305 cases decided in five states.) [hereinafter "GAO Report"].

[12] Stephen Daniels & Joanne Martin, *Civil Juries and the Politics of Reform* 214 (1995) ("[P]unitive damage award activity suggests . . . the need for . . . skepticism with regard to claims about the increasing frequency of such awards.").

[13] James S. Kakalik et al., *Costs and Compensation Paid in Aviation Accident Litigation* 27 (1988) ("[P]unitive damages were not paid on any of the 2,198 closed cases."); Erik Moller, *Trends in Civil Jury Verdicts Since 1985*, 33 (1996) ("[P]unitive damages are awarded very rarely."); Mark Peterson, Syam Sarma & Michael Shanley, *Punitive Damages: Empirical Findings* 10 (1987) (Fewer than seven punitive damages awards per year in Cook County and fewer than six in San Francisco from 1960–1984.).

[14] William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law*, 304–07 (1987) ("[The] insignificance of punitive damages in our sample is evidence that they are not being routinely awarded.").

university-based academics.[15] Since that time additional studies have been conducted.[16]

Every one of the above studies of actual jury verdicts has concluded that punitive damages are rarely awarded.

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[15] Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623, 633–37 (1997) (summarizing studies on the decision to award punitive damages) [hereinafter "Eisenberg et al., *Predictability*"]; Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: An Empirical Study, 87 Cornell L. Rev. 743, 745 (2002) [hereinafter "Eisenberg et al., *Juries, Judges, & Punitive Damages* 2002"]; Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16 Just. Sys. J. 21 (1993); Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters,"* 47 Rutgers L. Rev. 975, 981–92 (1995) (concluding that punitive damages are rarely awarded in medical malpractice cases) [hereinafter "Rustad & Koenig, *Reconceptualizing*"].

[16] For example, a 2000 Georgia study concluded that "punitive damages currently are not a significant factor in personal injury litigation in Georgia." Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 Ga. L. Rev. 1049, 1094 (2000). A Florida study found that frequency of punitive damages awards to be "strikingly low." Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida:* In Terrorem *and in Reality*, 38 Harv. J. Legis. 487, 487 (2001). *See also* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 31 (1990) (1,287 cases involved punitive awards out of the 25,627 civil jury verdicts studied.); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 Ohio St. L.J. 315, 388 (1999) (no punitive awards in medical malpractice or products liability cases in a twelve-year period in Franklin County, Ohio); Neil Vidmar, *Medical Malpractice and the American Jury* 254 (1995) (two punitive awards in 1,300 North Carolina medical malpractice cases); Eisenberg et al., *The Relation between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards, in Civil Juries and Civil Justice: Psychological and Legal Perspectives* (Brian Bornstein et al. eds., forthcoming 2007), *available at* http://ssrn.com/id=929565 ("Multiple studies establish that punitive damages are rarely awarded. . . .") [hereinafter "Eisenberg et al. 2007"].

These findings strongly indicate that juries are very selective in awarding punitive damages.

B. The Incidence of Punitive Damages Has Not Increased.

The most recent Bureau of Justice Statistics study showed that in 2001 plaintiffs received punitive damages in 5.6 percent of jury trials in which plaintiffs prevailed, compared to 6.1 percent in 1992. While this difference is not statistically significant, it is in a direction *opposite* to claims that punitive damages are increasing.[17] In contract cases the percentage of punitive awards declined from 12.9 percent in 1992 to 10.1 percent in 2001, a difference that is statistically significant.[18] The number of punitive damage awards for $1 million or more was 13.9 percent in 2001 versus 12.2 percent in 1992.[19] The small increase in the percent of million dollar awards was not statistically significant.

Strikingly, Rustad's review of earlier studies yielded a similar conclusion.[20] His research indicated that, with the exception of asbestos cases, punitive damages were in decline beginning at the end of the 1970s.[21]

In a recently completed study Eisenberg, Hans, and Wells investigated the relationship between punitive and

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[17] Bureau of Justice Statistics March 2005, *supra* note 6, at 8 tbl.9.

[18] *Id.*

[19] *Id.*

[20] Michael Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes with Emprical Data*, 78 Iowa L. Rev. 1, 36–39 (1992).

[21] *Id.* at 37–38.

compensatory damages by combining the Bureau of Justice Statistics data for 1992, 1995, and 2001 with data on large awards collected by Hersch and Viscusi and with data on large awards collected by the *National Law Journal*.[22] Analyses showed no noticeable increase in either compensatory or punitive damages for any of the three sets of data.

In short, jury critics' claim that punitive damages are on the increase is not supported by hard data.

C. Punitive Damages Are Primarily Awarded in Cases Involving Intentional Torts and Fraud.

Empirical data consistently show that punitive damages are rare in product liability and medical malpractice cases. For example, the Bureau of Justice Statistics data show that in 2001, among the nation's seventy-five largest counties there were only three punitive damage awards out of a total of seventy product liability cases in which plaintiffs prevailed (two of the three cases involved asbestos) and fifteen awards out of 311 medical malpractice cases.[23] These findings are consistent with other studies.[24]

Rustad's review of empirical studies on punitive damage awards concluded that the biggest growth area for large punitive damages was not in personal injury, but in

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[22] Eisenberg et al. 2007, *supra* note 16.

[23] Bureau of Justice Statistics April 2004, *supra* note 6, at 6 tbl.7.

[24] *E.g.*, Rustad & Koenig, *Reconceptualizing*, *supra* note 15.

business and contract litigation involving economic harm resulting from opportunistic business practices.[25]

Vidmar and Rose's examination of punitive awards against businesses led them to conclude that:

> punitive damages against businesses all tended to involve allegations of either a knowing and active disregard for the law – e.g. illegal toxic dumping, allowing minors to have alcohol, falsely reporting inspections – or misconduct by people in senior positions – e.g., a ship's captain, a business owner, corporate executives. In short, these cases rarely involved businesses engaging in commonly accepted practices or those having taken normal precautions for safety.[26]

The Bureau of Justice Statistics data indicate that in 2001, punitive damages were most likely to be awarded in cases involving slander/libel, intentional torts and false arrest/imprisonment. In contract cases punitive damages were most likely to be awarded in partnership disputes, employment discrimination and fraud.[27]

D. Punitive Damages Tend to Be Modest and To Be Positively Correlated with Compensatory Damages.

In *BMW of N. Am., Inc. v. Gore*[28] and *State Farm Mut. Auto Ins. Co. v. Campbell*[29] this Court, while reluctant to

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[25] Rustad, *supra* note 10, at 37–39.

[26] Vidmar & Rose, *supra* note 16, at 499.

[27] Bureau of Justice Statistics April 2004, *supra* note 6, at 5. These figures include both jury and bench trials.

[28] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996).

establish concrete constitutional limits, suggested that the ratio between punitive damages and the actual harm and potential harm to the plaintiff or non-parties should ordinarily not exceed a single digit.

The empirical findings show the damages awarded by juries and upheld by courts are in line with this Court's directives. The Bureau of Justice Statistics data for 2001 show that the median inflation-adjusted punitive award when plaintiffs prevailed was only $50,000, compared with $63,000 in 1992.[30]

In a study covering nine states, Daniels and Martin found that, in fifteen of twenty counties that had more than ten punitive verdicts, the median punitive award was below $40,000.[31]

In a sample of Florida cases involving both personal injury and business disputes covering the years from 1989 through 1998 Vidmar and Rose found that the median punitive award was only seventy percent of the compensatory award.[32]

Rustad's study of 355 product liability cases involving punitive damages over a twenty-five year period yielded a conclusion that the median ratio of punitive damages to

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[29] *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 410 (2003).

[30] Bureau of Justice Statistics March 2005, *supra* note 6, at 8 tbl.9.

[31] Steven Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 41–42 (1990).

[32] Vidmar & Rose, *supra* note 16, at 501 tbl.3.

compensatory damages awarded at trial was 1.67 to 1.[33] Compensatory damages were actually higher than punitive damages in fully thirty-six percent of the cases.[34] Rustad further concluded that when the awards were adjusted for inflation there was "virtually no change in the size of verdicts."[35] Finally, the data showed that "[a]lthough the ratio of compensatory to punitive damages was admittedly higher in a small number of awards, the pattern was that punitives are proportionate to actual damages."[36]

Eisenberg et al. analyzed a nationwide sample of punitive damage awards plus samples of cases from Illinois and California. Those authors found a strong and statistically significant correlation between compensatory damages and punitive awards.[37] Similar correlations were found in the GAO study,[38] the RAND study,[39] and other studies.[40] Additionally, Eisenberg et al. found no evidence

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[33] Michael Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes with Emprical Data*, 78 Iowa L. Rev. 1, 50 (1992).

[34] *Id.* at 1, 51.

[35] *Id.* at 49.

[36] *Id.* at 51.

[37] Eisenberg et al., *Predictability*, *supra* note 15, at 637–39, 647–52.

[38] U.S. General Accounting Office, *Product Liability Verdicts and Case Resolution in Five States*, GAO/HRD-89-90 (Sept. 1989).

[39] Erik Moller et al., *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. Legal Stud. 283, 300 n.52 (1997).

[40] Jonathan M. Karpoff & John R. Lott, *On the Determinants and Importance of Punitive Damage Awards*, 42 J.L. & Econ. 527, 543 (1999).

that punitive awards are more likely when individuals sue businesses than when individuals sue individuals.[41]

Eisenberg, Hans and Wells further investigated the relationship between punitive and compensatory damages in their combined data sets involving the Bureau of Justice Statistics data for 1992, 1995 and 2001, the data on large awards collected by Hersch and Viscusi, and the data on large awards collected by the *National Law Journal*.[42] The data showed that large punitive awards are almost never given in cases with small compensatory awards. Further, the analyses demonstrated a strong, significant positive correlation between punitive and compensatory awards.

E. "Blockbuster" Cases: Punitive Damages Also Correlate with Compensatory Damages.

While essentially conceding that, overall, punitive damages positively correlate with compensatory damages, a study by Hersch and Viscusi examined cases with punitive awards equaling or exceeding $100 million ("blockbuster awards") and claimed to have found that "blockbuster awards are not correlated with compensatory damage awards."[43]

Eisenberg and Wells challenged the Hersh and Viscusi conclusions by drawing attention to major flaws in their

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[41] Eisenberg *supra* note 37, at 639–40, 646.

[42] Eisenberg et al. 2007, *supra* note 16.

[43] Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. Legal Stud. 1, 2, 34 (2004).

statistical methodology.[44] Using correct methodologies and appropriate statistical analyses, Eisenberg and Wells recalculated the data involving every known punitive award equal to or in excess of $100 million occurring between 1985 and 2003. They found a strong, statistically significant relationship between punitive and compensatory awards: the larger the punitive award, the larger the compensatory award. Eisenberg and Wells thus demonstrated that, contrary to the Hersch and Viscusi conclusion, "Blockbuster punitive awards, like other punitive awards, show a strong association with compensatory awards."[45]

The subsequent Eisenberg, Hans and Wells study also concluded that there was no evidence showing an increase over time in so-called blockbuster awards.[46]

In short, there is a positive, statistically reliable relationship between compensatory and punitive awards for cases involving very large punitive awards as well as the overwhelming bulk of cases with more modest verdicts.

F. Juries and Judges Use Similar Criteria in Deciding Punitive Damages.

One way to assess the responsibility and fairness of the punitive damage awards of juries is to compare jury awards to awards made by judges when cases are tried in

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[44] Theodore Eisenberg & Martin Wells, *The Significant Association between Punitive and Compensatory Damages in Blockbuster Cases: A Methodological Primer*, 3 J. Empirical Legal Stud. 175, 177–78 (2006).

[45] *Id.* at 194.

[46] Eisenberg et al. 2007, *supra* note 16.

bench trials. A recent study by Eisenberg et al. has done just that.[47] Drawing upon the data collected by the Bureau of Justice Statistics in 1992, 1995 and 2001 Eisenberg et al. compared awards made by juries with awards made by judges.[48] There were 11,610 cases in the total sample and punitive awards were made in 539 cases with non-zero compensatory awards, 438 (81.3 percent) made by juries and 101 (18.7 percent) made by judges.[49] The researchers examined (a) the relationship between compensatory damages and punitive damages and (b) the rates at which judges versus juries awarded damages. There is, of course, a problem of case selection: judges and juries hear different types of cases. However, to the extent possible, these differences were taken into account in the analyses.

Statistical regression analyses indicated that juries and judges awarded about the same amount of punitive damages per dollar of compensatory damages. Eisenberg et al. concluded that there was "no substantial evidence that judges and juries behave differently in any meaningful and systematic manner."[50]

Eaton et al. studied over 25,000 civil cases filed in state and superior courts in Georgia.[51] They concluded that

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[47] Theodore Eisenberg et al., *Judges, Juries and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996 and 2001 Data*, 3 J. Empirical Legal Stud. 263, 267 (2006).

[48] *Id.*

[49] *Id.* at 268.

[50] *Id.* at 265.

[51] Thomas Eaton et al., *The Effects of Seeking Punitive Damages on the Processing of Tort Claims*, 34 J. Legal Studies 343, 344 (2005).

"[a]fter controlling for other factors, juries in Georgia are not more likely than judges to award punitive damages."[52]

A study by Robbennolt complements the Eisenberg and Eaton et al. findings while avoiding the problem of juries and judges deciding different cases.[53] Robbennolt asked eighty-seven federal and state trial court judges and 140 jury-eligible citizens to respond to a description of a lawsuit, which involved an injury resulting from an HMO policy prescribing a particular medication despite an internal memo indicating potential side effects. The outcome was described as either moderate or severe; the wealth of the HMO was also varied. Each participant was provided with one version of the incident and asked to recommend compensatory and punitive damages. Robbennolt found that the decision making of judges and citizens with regard to punitive damage awards was quite similar. The severity of the plaintiff's injury influenced compensatory awards, but both actual and potential injury combined to influence punitive damage awards among both judges and juries.[54] When the defendant's actions were perceived to be more offensive jurors and judges tended to award more punitive damages. Robbennolt concluded that the recommended punitive damages of juries and judges "were influenced by the same factors and were of similar magnitude."[55]

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[52] *Id.* at 364.

[53] Jennifer Robbennolt, *Punitive Damage Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 Law & Hum. Behav. 315 (2002).

[54] *Id.* at 320–33.

[55] *Id.* at 336.

In short, the decision-making of juries in awarding punitive damages was found to be similar to the decision-making of trial judges.

G. Other Research Supports and Complements the Findings Cited Above.

Experimental studies on punitive damages have found that the severity of the injury caused to the plaintiff, or the potential harm that the defendant's actions may have caused or the reprehensibility of the defendant's behavior influenced punitive awards.[56]

Greene and her colleagues studied the decisions of jury-eligible citizens and students in a series of experiments that used case scenarios involving personal injury, products liability, insurance bad faith, automobile negligence and medical malpractice. The jurors tended to award greater damages when the defendants had acted in a reprehensible manner.[57]

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[56] For a general review of these studies, see generally Jennifer Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 Buffalo L. Rev. 103 (2002) and Edith Greene & Brian Bornstein, *Determining Damages: The Psychology of Jury Awards* (2003). An experiment by Corrine Cather et al., *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards*, 20 Law & Hum. Behav. 189, 201–02 (1996), did not find an effect of severity on punitive damage awards, but the result may have been due to problems in the case materials presented to the participants.

[57] Corrine Cather et al., *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards*, 20 Law & Hum. Behav. 189, 201 (2005); Edith Greene et al., *Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?*, 24 Law & Hum. Behav. 187, 196 (2000); Edith Greene et al., *The Effects of Defendant Conduct on Jury Damage Awards*, 86 J. Applied. Psychol.

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Kahneman et al. asked citizens to evaluate a series of personal injury claims and rate the outrageousness of the conduct, the appropriate level of punishment or to make a punitive damage award. Larger punitive damages were awarded when the injury was rated as more severe.[58]

Horowitz and Bordens conducted a complex simulation experiment, finding that the earlier the defendants should have been aware of the harmful effects, the greater the award.[59] In another experiment, those authors found that the amounts of the punitive award increased when the potential plaintiff population involved hundreds of potential victims.[60]

Some studies have found that the wealth of the defendant is correlated with the size of the punitive award.[61] This should not be surprising, nor inappropriate. In 1869, the Maine Supreme Judicial Court in *Goddard v.*

228, 235–36 (2001); Edith Greene et al., *The Effects of Limiting Punitive Damage Awards*, 25 Law & Hum. Behav. 217, 225 (2001). *See generally* Edith Greene & Brian Bornstein, *Determining Damages: The Psychology of Jury Awards* 134 (2003) (describing the relationship between defendant's conduct and the size of punitive awards).

[58] Daniel Kahneman, David Schkade & Cass Sunstein, *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. Risk & Uncertainty 49, 62–64 (1998).

[59] Irwin Horowitz & Kenneth Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 Law & Hum. Behav. 269, 281 (1990).

[60] Irwin Horowitz & Kenneth Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Jury Decisions*, 12 Law & Hum. Behav. 209, 225–27 (1988).

[61] *See* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wis. L. Rev. 15, 42–48 (1998) ("Punitive damages are based on the wealth of the defendant in the vast majority of states. . . .").

Grand Trunk Railway[62] concluded that large punitive damages against a corporation served an "impressive lesson."[63]

Despite the obvious logic of making the wealthy pay more to achieve commensurate punishment, research indicates that jurors take defendant wealth into account in a responsible way rather than in the irresponsible way that critics of juries often attribute to them.[64] Hans conducted systematic, in-depth interviews with jurors who had recently decided cases involving business corporation defendants and rendered punitive awards.[65] The interviews revealed that juries took the wealth of the corporation into account, but they did not do so casually. Jurors viewed larger corporations as capable of paying more than smaller corporations, but at the same time did not want to excessively harm them financially. Hans concluded that "[j]urors' remarks reflect concern about emptying a corporate defendant's pockets, ruining a business through high awards. Other comments indicate that jurors in punitive damage cases consider the deterrent impact of an award."[66]

The desire to punish reprehensible behavior commensurate with harm or potential harm appears to be the primary, indeed, the controlling motive, behind jury awards of punitive damages.

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[62] *Goddard v. Grand Trunk Railway of Canada*, 57 Me. 202 (1869).

[63] *Id.* at 228.

[64] Some of these claims are reviewed in Valerie P. Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* 196–97 (2000).

[65] *Id.* at 196–98.

[66] *Id.* at 197–98.

H. Reprehensible Behavior Evokes Strong Societal Condemnation.

The fact that punitive damages are most likely to be awarded in cases involving intentional torts and fraud, especially when the harm or potential harm is very serious or the defendant's behavior is judged as reprehensible, should not be surprising. In 1893, Emile Durkheim, one of the fathers of modern sociology, observed that harms to an individual victim evoked strong reactions in communities because they violate widely shared societal norms about behavior, thus making everyone a victim.[67] Galanter and Luban have argued that punitive damages primarily serve to emphasize the norms and important values implicit in laws proscribing fraud or other reprehensible behavior.[68] Sebok has shown that in the nineteenth-century the primary function of punitive damages was for punishment and vindication.[69]

Robbennolt, Darley, and MacCoun also drew attention to the retributive role that punitive damages play in restoring the values implicit in laws proscribing intentional civil misconduct.[70] Sunstein noted that laws have

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[67] Emile Durkheim, *The Division of Labor in Society* (1893). *See also* Kai Erikson, *Wayward Puritans: A Study of the Sociology of Deviance* (1966) (studying the functional role of social deviance in seventeenth-century Massachusetts); Neil Vidmar, *Retribution and Revenge, in Handbook of Justice Research in Law* 31 (Joseph Sanders & V. Lee Hamilton eds., 2001).

[68] Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, 1396 (1993).

[69] Anthony Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 Chi-Kent L. Rev. 163, 205 (2003).

[70] Jennifer Robbennolt, John Darley, & Robert MacCoun, *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as*

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"expressive" functions that incorporate important social values.[71]

An experiment by Anderson and MacCoun presented simulating jurors with personal injury cases and the option of awarding the punitive damages to the individual plaintiff or to the state. Contrary to many people's intuitions, the jurors were more likely to award the damages to the plaintiffs rather than the state, causing the authors to conclude that punitive damages serve a restorative function, advancing the breach caused by the defendant's reprehensible actions.[72]

I. Exxon-Funded Research Does Not Provide Credible Grounds For Concluding That Juries Are Incompetent.

A series of jury simulation studies funded by the Exxon Corporation in the wake of the punitive award

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Goal Managers, 68 Brook. L. Rev. 1121, 1142–44 (2003). Although arguing for treating punitive damages as a form of compensatory damages, Sharkey's concept of punitive damages as "societal damages," Catherine Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347, 393–99 (2003), has drawn attention to the fact that in many punitive damages cases the harm is not just to the individual plaintiff or plaintiffs in a law suit but also to persons who were harmed but were not part of the lawsuit ("absent plaintiffs") but others who could potentially be harmed as a result of the violations of the law ("quasi-plaintiffs"). *Id.*

[71] Cass Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2024–25 (1996).

[72] Michelle Anderson & Robert MacCoun, *Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 Law & Hum. Behav. 313, 327–28 (1999).

rendered for the Exxon Valdez Alaska oil spill,[73] and eventually compiled in a book,[74] led the authors to assert that jury decision-making with regard to punitive damages was unreliable, erratic and unpredictable.[75]

The broad conclusions of the Exxon-funded researchers have been severely critiqued in a number of articles by scholars who had no connection to the research.[76] *Punitive*

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[73] Elizabeth Amon, *Exxon Bankrolls Critics of Punitives, Then It Cites the Research in Appeal of $5.3 Billion Valdez Award*, National Law Journal, May 17, 1999, at A1; Alan Zarembo, *Funding Studies to Suit the Need; In the 1990s, Exxon Began Paying for Research into Juries and the Damages They award; The Findings Have Served the Firm Well in Court*, Los Angeles Times, Dec. 3, 2003, at A1; William R. Freudenburg, Paper Abstract, *The Intersection of Corporate Cash, Science and the Law: Toward a Closer Examination*, Session on Law and Society: Legal Institutions and Processes, Annual Meeting of the American Sociological Association, Aug. 16, 2003.

[74] Cass Sunstein et al., *Punitive Damages: How Juries Decide* (2002).

[75] *Id.* at 241.

[76] *See* Neal Feigenson, *Can Tort Juries Punish Competently?*, 78 Chi.-Kent L. Rev. 101, 242 (2002) ("[T]he data do not support the author's critical view of punitive damages. . . ."); Steven Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis: A Problem Without A Solution*, 52 Stan. L. Rev. 1809, 1817 (2000) ("The supporting argument and evidence [for abolishing punitive damages in product liability] are . . . far from compelling."); Richard Lempert, *Juries, Hindsight Bias, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DePaul L. Rev. 867, 870, 877 (1999) ("The [Exxon-funded] authors . . . do not make an adequate social science case for . . . change, and their recommendation that this should be done deserves no weight in any policy arena."); Robert MacCoun, *The Costs and Benefits of Letting Juries Punish Corporations: Comment on Viscusi*, 52 Stan. L. Rev. 1821, 1827 (2000) ("Viscusi's data on their own are clearly too modest to support his sweeping call to either remove punitive damages judgments from the jury or eliminate punitive damages altogether."); Catherine Sharkey, Book Review, *Punitive Damages: Should Jurors Decide?*, 82 Tex. L. Rev. 382, 385 (2003) ("A fuller examination of Sunstein et al.'s empirical work reveals the

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Damages essentially ignored or misstated real world findings that contradicted or were inconsistent with their own experimental findings, used experimental materials that were biased or required participants to make legal versus fact decisions and failed to adequately recognize the limitations of the experiments.

Although some of the experiments from *Punitive Damages* yield interesting and useful insights about juror decision-making, the studies do not provide a sufficient basis to make broad claims that juries are incompetent or erratic in awarding punitive damages.

II. Judges Adequately Exercise Oversight Of Punitive Jury Awards and Post-Verdict Settlements Often Reduce Awards.

As noted earlier, one of the arguments against punitive damages is that trial courts are not using their powers to supervise jury verdicts. While there are instances in which juries arguably render verdicts that are excessive,

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indeterminacy—and possible inapplicability—of that research with respect to broader nonretributive theories of punitive damages. What this reveals, more generally, is the contingent nature of Sunstein et al.'s conclusions, and the implicit, and perhaps erroneous, assumptions that underlie their policy prescriptions."); Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error and Overreaching in Sunstein et al.'s Punitive Damages*, 53 Emory L.J. 1359, 1403 (2004) ("[I]t is abundantly clear that *Punitive Damages* should not be treated as empirical authority for individual cases or for tort reform generally.") Neil Vidmar, *Juries Don't Make Legal Decisions! And Other Problems: A Critique of Hastie et al. on Punitive Damages*, 23 Law & Hum. Behav. 705, 712 (1999) ("I am disturbed by the article, not only because of the legal errors, misstatements, and unsupported assertions that it contains, but by the authors' attempt to draw largely unqualified policy implications.").

research shows that judges frequently exercise *remittitur* or reverse verdicts.

Rustad has pointed out that individual states provide methods for reviewing the excessiveness of punitive damage awards.[77] These standards include "passion or prejudice" and "shock the conscience" tests.[78]

The General Accounting Office study of product liability cases rendered between 1983 and 1985 in five states found post-trial reductions in eighty-two percent of punitive damages verdicts.[79]

A RAND study of awards in Cook County, Illinois and San Francisco, California concluded that for awards amounting to $1 million or more, reductions amounted to almost forty percent.[80]

Landes and Posner found that federal appellate courts reversed or remanded the majority of punitive awards, and in state trials, punitive damages were of "relative insignificance" in the area of products liability.

Viscusi reached a similar conclusion about products liability cases, finding that only twenty-nine percent of the

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[77] Michael Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 Loy. La. L. Rev. 1297, 1329–34 (2005).

[78] *Id.*

[79] U.S. General Accounting Office, Report to the Chair, Subcommittee on Commerce, Consumer Protection and Competitiveness, Committee on Energy and Commerce, House of Representatives, *Product Liability: Verdicts and Case Resolution in Five States*, GAO/HRD-89-99, at 42 (1989).

[80] Michael Shanley & Mark Peterson, *Posttrial Adjustments to Jury Awards* 29 (1987).

punitive award was paid.[81] Of particular note, the "block-buster" punitive awards studied by Hersch and Viscusi are regularly reduced.[82]

Empirical research further indicates that the damage awards are also reduced in post-verdict settlements without the need for judicial intervention.

Rustad examined the post-trial outcomes of punitive damages verdicts rendered between 1965 through 1990.[83] Almost forty percent of the cases were settled between the parties. Thirty-two percent were reduced or reversed by the trial judge or an appellate court. Twenty-five percent of cases were affirmed upon appeal.[84] No punitive damages

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[81] W. Kip Viscusi, *Reforming Products Liability* 94 (1991).

[82] *E.g.*, *IGEN Intern., Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303 (4th Cir. 2003) (reducing award of about $505 million by over 90 percent); *50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247 (5th Cir. 1999) (Jury awarded in excess of $150 million in compensatory, consequential, and punitive damages; punitive award struck on appeal.); *Pioneer Commercial Funding Corp. v. American Financial Mortg. Corp.*, 855 A.2d 818 (Pa. 2004) (striking large jury award); *COC Services, Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654 (Tex. App. 2004) (striking large punitive damages award); *Amoco Chemical Co. v. Certain Underwriter's at Lloyd's of London*, 1996 WL 407855 (Cal. App.) (reversing large jury award). In *MMAR Group, Inc. v. Dow Jones & Co.*, 987 F.Supp. 535 (S.D. Texas 1997), a jury awarded $220,720,000 in compensatory and punitive damages. A retrial was ordered based on plaintiff discovery abuse, *see* Felicity Barringer, *Judge Says Record Libel Case Should Be Retried*, N.Y. Times, Apr. 9, 1999, at C1, and it is reported that MMAR eventually chose not to pursue the case, David McHam, *Law & the Media in Texas: Handbook for Journalists, available at* http://www.texaspress.com/Lawpress/LawMedia/Libel/TexasLibelCases.htm.

[83] Michael L. Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 54–59 (1992).

[84] *Id.* at 55.

were paid in forty-six percent of cases and some of the award was paid in fourteen percent of the cases. The full award was paid forty percent of the time.[85]

Rustad and Koenig found that in the relatively rare instances in which punitive damages were given in medical malpractice cases, in more than 40 percent of such cases the awards were reversed on appeal, settled or were not collectable due to defendant insolvency.[86]

Karpoff and Lott sampled almost two thousand cases involving claims for punitive damages that covered the broad spectrum from which punitive damage claims arise and found that post-verdict settlements were substantial.[87] The mean post-verdict punitive award settlement was never more than seventeen percent of the mean punitive award; in many types of cases punitive awards were never a factor in the settlements.[88]

Vidmar and Rose identified the twenty largest awards in their sample of Florida cases.[89] They concluded that at least half of the awards resulted either in no payment or a reduced payment.

In summary, there is very strong evidence of judicial supervision of punitive awards. Post-verdict settlement negotiations are another common mechanism through which punitive damages are adjusted downward or not paid at all.

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[85] *Id.* at 56.

[86] Rustad & Koenig, *Reconceptualizing*, *supra* note 15 at 1009–12.

[87] Karpoff & Lott, *supra* note 40, at 527–30.

[88] *Id.* at 537–38.

[89] Vidmar & Rose, *supra* note 15, at 506.

CONCLUSION

Critics of punitive damages assert that juries are irresponsible, incompetent and biased in awarding damages and imply that trial and appellate courts do not adequately supervise or control punitive awards. Hard empirical data say otherwise on both issues.

American juries render punitive damages competently and responsibly and in a manner similar to decisions of experienced trial judges. Moreover, the data indicate that jury verdicts are rendered in accord with this Court's concern in *State Farm* and earlier cases that the principal criterion for punitive damages should be the reprehensibility of the defendant's behavior. Solid and extensive empirical facts should always trump anecdotes and innuendo. The empirical facts indicate that there is no need for this Court to impose additional federal constitutional due process standards on state punitive damages laws.

For the following reasons, the *amici* request that the decision below be affirmed.

Respectfully submitted,

FREDERICK M. BARON, ESQ.*
BARON & BUDD, P.C.
5956 Sherry Lane, Ste. 1616
Dallas, TX 75225
(214) 265-4400

**Counsel of Record*

PERRY WEITZ, ESQ.
WEITZ & LUXENBERG, P.C.
180 Maiden Lane, 17th Fl.
New York, NY 10038-1850
(212) 558-5508

Counsel for Amici Curiae

APPENDIX

Neil Vidmar is Russell M. Robinson II Professor of Law, Duke Law School, and Professor of Psychology at Duke University. He holds a Ph.D. in social psychology from the University of Illinois (1967) and conducts empirical studies on issues in the legal system, including the subject of punitive damages. He is co-author of *Judging the Jury* (1986), author of *Medical Malpractice and the American Jury* (1995) and editor and author of *World Jury Systems* (2000). Vidmar has published more than 100 articles in law reviews and social science journals (e.g. Stanford Law Review; Brooklyn Law Review; Law & Human Behavior; Law & Society Review; Harvard Journal on Legislation; Duke Law Journal). He reviews research proposals for the National Science Foundation and is a current or past member of the following editorial boards of peer review journals: Law & Human Behavior; Law & Society Review; Law & Social Inquiry; Journal of Applied Social Psychology; Psychology Crime & Law; and Legal & Criminological Psychology; Psychology, Public Policy & Law; and the Journal of Empirical Legal Studies.

Brian Bornstein is Professor of Psychology, University of Nebraska-Lincoln, and Courtesy Professor of Law, University of Nebraska-Lincoln, where he is Associate Director of the law-psychology program. He holds a Ph.D. in experimental psychology from the University of Pennsylvania (1991) and a Master of Legal Studies (MLS) from the University of Nebraska (2001). He has conducted and published research on juries in peer review journals and has received funding from the National Science Foundation for this research. He is co-author of the book *Determining Damages: The Psychology of Jury Awards* (2003) and has published more than 50 articles in social science

journals and law reviews (e.g., Law and Human Behavior; Behavioral Sciences & the Law; Law & Psychology Review; Psychology, Crime and Law; Journal of Medicine and Law; and Florida State University Law Review). He reviews research proposals for the National Science Foundation and numerous journals and is a current member of the Law & Human Behavior editorial board.

Kevin M. Clermont is the Flanagan Professor of Law at Cornell Law School, where he has taught since 1974. He has also served as a visiting professor at Harvard Law School. He received his J.D. from Harvard and his A.B. from Princeton University. He is the author of numerous articles on civil procedure, as well as multiple books, including *Principles of Civil Procedure* (2005) and *Civil Procedure* (7th ed. 2004). His published research includes several empirical articles on the civil jury.

Stephen Daniels is a Senior Research Fellow at the American Bar Foundation in Chicago, IL, and an Adjunct Professor of Political Science at Northwestern University. He holds a Ph.D. in political science from the University of Wisconsin-Madison. His research focuses on law and public policy and the various aspects of the American civil justice system. He has written on trial courts, juries, plaintiffs' lawyers, and the politics of civil justice reform – including the areas of medical malpractice, products liability, and punitive damages. He is co-author (with Joanne Martin) of *Civil Juries and the Politics of Reform* (Northwestern University Press, 1995), and author or co-author of numerous articles in law reviews (e.g., Texas Law Review; Minnesota Law Review; and Wisconsin Law Review) and social science journals (e.g., Law & Society Review; Law & Policy; and Justice System Journal) focusing on law and public policy. He reviews research

proposals for the National Science Foundation and manuscripts for peer reviewed journals in the law and society field and in political science. He is a current member of the editorial board for Justice System Journal, a peer-reviewed journal.

Thomas A. Eaton is the J. Alton Hosch Professor at the University of Georgia School of Law where he has taught for more than twenty years. He has published articles on his empirical research on punitive damages and tort litigation in the Georgia Law Review, the Yale Law and Policy Review, the Yale Journal on Regulation, and the Journal of Legal Studies.

Theodore Eisenberg is the Henry Allen Mark Professor of Law at Cornell Law School. He graduated from Swarthmore College and the University of Pennsylvania Law School. He clerked for a federal appellate court and for Chief Justice Earl Warren (ret.). He has taught at UCLA, Harvard, and Stanford law schools. He is a Fellow of the Royal Statistical Society, serves on the Board of Directors of the American Law and Economics Association, and is a member of many professional associations. He is co-editor of the Journal of Empirical Legal Studies, is on the editorial board of American Law and Economics Review, is Editor-in-Chief of the multi-volume treatise Debtor-Creditor Law, and has written two casebooks. Professor Eisenberg's empirical studies have appeared in many leading peer-reviewed journals (e.g., Journal of the Royal Statistical Society; Journal of the American Statistical Association; Journal of Financial Economics; and Journal of Legal Studies) and student law reviews (e.g., Harvard Law Review; Cornell Law Review; Stanford Law Review; and University of Chicago Law Review) and books, and cover civil rights, finance, products liability,

punitive damages, judge and jury trials, the death penalty, class actions, and litigation models.

Solomon M. Fulero is Professor of Psychology at Sinclair College, and Clinical Assistant Professor of Psychology at Wright State University, School of Medicine, Department of Psychiatry, both in Dayton, Ohio. He received a Ph.D. in Psychology from the University of Oregon in August 1979 and his J.D. from the University of Oregon School of Law in December 1979. He is both a licensed psychologist and an attorney. He is a Fellow of the American Psychological Association, and President-Elect of the American Psychology-Law Society (APA Division 41), the major organization for the field of legal psychology. Dr. Fulero is Associate Editor of Law and Human Behavior, and is on the editorial board or is a reviewer for many other journals. He has published numerous articles in scholarly journals and law reviews, primarily on topics related to legal psychology, including jury behavior and eyewitness testimony. He is co-author of one of the leading texts in psychology and law, Wrightsman and Fulero, Forensic Psychology, 2nd Edition. His work has been cited by the U.S. Supreme Court in *United States v. Atkins*, and in other legal decisions.

Marc Galanter is John and Rylla Bosshard Professor Emeritus of Law and South Asian Studies at the University of Wisconsin-Madison and LSE Centennial Professor at the London School of Economics. He received degrees in philosophy and law from the University of Chicago. In addition to the University of Wisconsin and the London School of Economics, he has taught at Chicago, Buffalo, Columbia and Stanford. From 1990 to 1998, he was Director of Wisconsin's Institute for Legal Studies, one of the leading centers for empirical study of the legal system. He is the author of five books and over one hundred

articles on litigation, lawyers and legal culture, including articles on jury trials and on punitive damages. He has been editor of the Law & Society Review, President of the Law and Society Association, Chair of the International Commission on Folk Law and Legal Pluralism, a member of the Council on the Role of Courts, a Guggenheim Fellow, and a Fellow of the Center for Advanced Study in the Behavioral Sciences. He is a member of the American Law Institute and a Fellow of the American Academy of Arts and Sciences.

Edith Greene is Professor of Psychology at the University of Colorado in Colorado Springs. Her research focuses on decision making by jurors and juries, including work on punitive damages decision making. She received a B.A. from Stanford University (1975) and a Ph.D. in psychology and law from the University of Washington (1983). She has served as Fellow in Law and Psychology at Harvard Law School, a faculty member at the National Judicial College, and as lecturer to lawyers and judges nation-wide. She has been awarded Fellow status by the American Psychological Association and the Association for Psychological Science, and is the recipient of several research grants and awards. She is the author or co-author of many articles in law reviews and psychology journals and three books about psychology applied to the legal system, including *Determining Damages: The Psychology of Jury Awards* (2003). Greene serves on the editorial boards of Law and Human Behavior and Psychology, Public Policy and Law and is a past-president of the American Psychology-Law Society

Valerie P. Hans is Professor of Law at Cornell Law School. She holds a Ph.D. in Psychology from the University of Toronto. She conducts empirical studies of law and

is one of the nation's leading authorities on the jury system. She has carried out extensive research and lectured and written widely about social science and the law topics, including jury damage awards. Her books include *Business on Trial: The Civil Jury and Corporate Responsibility* (2000); *The Jury System: Contemporary Scholarship* (2006) and *Judging the Jury* (1986, coauthored with Neil Vidmar). She has served on the National Science Foundation's Law and Social Sciences Advisory Panel, and regularly serves as an external reviewer for National Science Foundation grant proposals. She serves on the editorial boards of Journal of Empirical Legal Studies; Journal of Psychology Public Policy, and Law; Law and Human Behavior; Law and Policy; Law & Society Review; and Psychology, Crime, and Law.

Michael Heise, Professor of Law at Cornell Law School, holds a J.D. from the University of Chicago and a Ph.D from Northwestern University, and specializes in empirical legal scholarship and bridging empirical methodologies, legal theory, and policy analysis. He writes in public and private law areas, including civil justice reform, punitive damages, education policy, criminal sentencing, and judicial decisionmaking. Professor Heise's teaching areas include torts, empirical methods for lawyers, insurance law, constitutional law, business torts, education law, and law and social science. Professor Heise has received numerous awards for his scholarship and teaching, including the Law & Society Association's Best Article Prize in 1999. Professor Heise has co-edited the Journal of Empirical Legal Studies since 2005.

Irwin A. Horowitz is Professor of Psychology at Oregon State University and has been Courtesy Professor of Law at the University of Oregon Knight School of Law. He

holds a Ph.D. in social psychology from Michigan State University (1966) and conducts experimental research on various legal issues including the competence of juries in both civil and criminal trials. Horowitz is co-author of *The Psychology of Law (1984),* and *Psychology of Law: Integrations and Applications (1998).* Horowitz has published numerous research articles dealing with jury performance in complex civil cases as well as research on jury nullification. These articles have been published, inter alia, in Brooklyn Law Review; Law & Human Behavior; Journal of Applied Psychology; Psychology, Public Policy & Law; and Judicature. He reviews research proposals for the National Science Foundation and a variety of journals, and his research has been funded over the years by a number of grants from the National Science Foundation.

Thomas H. Koenig is professor and chair of the department of Sociology and Anthropology at Northeastern University. His empirical studies on punitive damages have been published in a number of leading law reviews, such as Wisconsin Law Review, University of Michigan Journal of Law Reform, and American University Law Review, and in social science journals. He is co-author of *In Defense of Tort Law* (2001).

Margaret Bull Kovera is Professor of Psychology, John Jay College of Criminal Justice, and Director of the Forensic Psychology Doctoral Program at the City University of New York. She holds a Ph.D. in social psychology from the University of Minnesota (1994). She conducts empirical research on juror decision making, including how jurors award damages. Kovera has published articles in law reviews and social science journals (e.g. Minnesota Law Review; Law & Human Behavior; Journal of Applied Psychology). She has served on the panel that makes

funding recommendations for the Law and Social Science Program at the National Science Foundation, is the Associate Editor of Law and Human Behavior, and serves on the Editorial Board of Psychology, Public Policy, & Law. She is recipient of the Saleem Shah Award for Outstanding Early Career Contributions to the field of Psychology and Law, awarded by the American Psychology-Law Society and the American Academy of Forensic Psychology. She is President-Elect of the American Psychology-Law Society.

Stephan Landsman holds the Robert A. Clifford Chair in Tort Law and Social Policy at DePaul University College of Law. He is a nationally recognized expert on the jury system and served as Reporter to the American Bar Association's American Jury Project, which has rewritten the ABA's Principles for Juries and Jury Trials. He is the author of numerous books and articles, both historical and empirical, about the jury, as well as pieces on a range of other topics including the adversary system, punitive damages, human rights and the rules of evidence. His historical work on the hearsay rule was cited by Justice Rehnquist in *Crawford v. Washington*. He is a graduate of Kenyon College and Harvard Law School.

Robert MacCoun is Professor of Law, Professor of Public Policy, and Affiliated Professor of Psychology at the University of California at Berkeley. He holds a Ph.D. in Psychology from Michigan State University (1984). From 1985-1993, he was a Behavioral Scientist at the RAND Corporation, where he served on the staff of the Institute for Civil Justice, and in 1999 he was Visiting Professor of Public Policy at Princeton. He has over one-hundred publications, including articles in Science; Psychological Review; Psychological Bulletin; and in numerous law

reviews and law-related journals. He has served on the editorial boards of the Law & Society Review; Law & Social Inquiry; and the Journal of Empirical Legal Studies.

Nancy S. Marder is Professor of Law, Chicago-Kent School of Law. Prior to joining the Chicago-Kent faculty, Professor Marder was an associate professor of law at the University of Southern California Law School, where she taught since 1993. From 1990 to 1992, she was a law clerk to Justice John Paul Stevens of the U.S. Supreme Court. She also clerked for Judge William A. Norris on the Ninth Circuit Court of Appeals (1989-1990) and Judge Leonard B. Sand in the Southern District of New York (1989-1990). In 1987-88, Professor Marder was a litigation associate at the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison. Professor Marder has had articles published in the Northwestern University Law Review, Iowa Law Review, Texas Law Review and Yale Law Journal. She teaches Civil Procedure and a course on juries, judges and trials.

Joanne Martin is a Senior Research Fellow at the American Bar Foundation in Chicago, IL. She holds a J.D. from Loyola University of Chicago and an M.M. from Northwestern University's Kellogg School of Management. Her research focuses on law and public policy and the various aspects of the American civil justice system. She has written on trial courts, juries, plaintiffs' lawyers, and the politics of civil justice reform – including the areas of medical malpractice, products liability, and punitive damages. She is co-author (with Stephen Daniels) of *Civil Juries and the Politics of Reform* (Northwestern University Press, 1995), and author or co-author of numerous articles in law reviews (e.g., Texas Law Review; Minnesota

Law Review; and Wisconsin Law Review) and social science journals (e.g., Law & Policy, and Justice System Journal) focusing on law and public policy. She reviews research proposals for the National Science Foundation and is a current member of the editorial board for Law & Social Inquiry, a peer-reviewed journal.

James T. Richardson is Foundation Professor of Sociology and Judicial Studies at the University of Nevada, Reno, where he directs the graduate Judicial Studies degree program for trial judges, offered in conjunction with the National Judicial College and the National Council of Juvenile and Family Court Judges. He teaches a seminar, "Social and Behavioral Sciences and the Law", in the program. He has a Ph.D. in Sociology from Washington State University, as well as a J.D. from Old College, Nevada School of Law.

He has done research on the legal system, including research on jury behavior. He has published work in Law and Human Behavior; Behavioral Sciences and Law; Brigham Young University Law Review; University of Queensland Law Review; University of New South Wales Law Journal; The Justice System Journal; Judicature; and in other books and journals in the social sciences. He reviews for a number of journals in the social sciences and in law-related fields.

Jennifer K. Robbennolt is Professor of Law and Psychology at the University of Illinois College of Law. She holds a J.D. and a Ph.D. in social psychology from the University of Nebraska-Lincoln. Her research integrates psychology into the study of law and legal institutions, focusing primarily on legal decision-making and the use of empirical research methodology in law. Her work is

published in law reviews and social science journals such as the Michigan Law Review; the Arizona Law Review; the Brooklyn Law Review; the Journal of Empirical Legal Studies; Law and Human Behavior; the Journal of Applied Social Psychology; and Behavioral Science and the Law. She recently served as Secretary of the American Psychology-Law Society and is the chair-elect of the Association of American Law Schools (AALS) section on Law and the Social Sciences. She has reviewed research proposals for the National Science Foundation and serves on the editorial boards of Law and Human Behavior and Psychology, Public Policy, and Law.

Mary R. Rose is Assistant Professor of Sociology and Law at the University of Texas at Austin, where she teaches courses on social science and law as well as social psychology and research methods. Her research examines lay participation in the legal system and perceptions of justice, and she has written on a variety of jury-related topics including the effects of jury selection practices on jury representativeness, reactions to voir dire, jury damage awards, and jury innovations. She serves on the editorial boards of Law & Social Inquiry and Law & Society Review, and is a trustee of the Law & Society Association.

Michael L. Rustad is the Thomas F. Lambert Jr. Professor of Law and Director of the Intellectual Property Law Program at Suffolk University Law School. He was the principal investigator in nationwide studies of punitive damages in products liability and medical malpractice. He has written numerous law review articles and a treatise chapter on punitive damages. He is co-author of *In Defense of Tort Law* (New York University Press, 2001).

Susette M. Talarico is Albery Berry Saye Professor of American Government and Constitutional Law Emerita in the School of Public and International Affairs at the University of Georgia. Dr. Talarico also served as Meigs Distinguished Professor of Political Science and Director of Criminal Justice Studies at the University of Georgia, where she taught for twenty-nine years. Currently, she serves as academic program coordinator in political science. Among other professional accomplishments, Dr. Talarico served as editor-in-chief of Justice System Journal for five years (1999-2004).

Martin T. Wells has training in both statistics (Ph.D. University of California) and social science that permits informed evaluation of legal issues. For instance, he has served on four National Academy of Sciences Panels on Census 2000 and has been an ad hoc reviewer of reports and correspondence between the National Academy of Sciences and the United States Census Bureau. He has also testified before The United States House of Representatives Subcommittee on Census 2000 in regard to issues on the statistical adjustment of the differential undercount, and has served as a member of the American Statistical Association's advisory committee to The Bureau of Justice Statistics. Wells has also served as an Editor for Journal of the American Statistical Association and continues as an Associate Editor for the same journal. At Cornell University, Wells is a Professor of Social Statistics, Chair of the Department of Biological Statistics and Computational Biology, and is an Invited member of the Law School Faculty.

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, D.C. 20036
(202) 588-0302

ARVIN MASKIN *
KONRAD L. CAILTEUX
DAVID R. SINGH
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, N.Y. 10153
(212) 310-8000

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.

2. Whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.[1]

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[1] In their brief, *amici curiae* will focus primarily on the first question.

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Victor E. Schwartz, Punitive Damages: Should the Constitution of the United States Provide Boundaries (Washington Legal Foundation Legal Backgrounder, 1989) 2

INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these topics.[1]

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform and opposing excessive punitive damages and attorneys' fee awards. WLF appeared as *amicus curiae* in *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003); *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. America, Inc.* v. *Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993); and *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991).

In addition, WLF has published numerous articles regarding punitive damages. *See, e.g.*, Christine J. Imre, *A Punitive Damages Primer: Post-State Farm Strategies*, (Washington Legal Foundation 2004); Arvin Maskin, et al., *A Punitive Damages Primer: Legal Principles and Constitutional Challenges*, (Washington Legal Foundation

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation and submission of this brief.

1994); Victor E. Schwartz, et al., *Multiple Imposition of Punitive Damages: The Case For Reform*, (Washington Legal Foundation Working Paper No. 50, 1992); Stephen M. Turner, et al., *Punitive Damages Explosion: Fact or Fiction?* (Washington Legal Foundation Working Paper No. 50, 1992); Victor E. Schwartz, *Punitive Damages: Should the Constitution of the United States Provide Boundaries* (Washington Legal Foundation Legal Backgrounder, 1989); Theodore B. Olson and Theodore J. Boutrous, *The Constitutionality of Punitive Damages* (Washington Legal Foundation Legal Backgrounder 1989). Excessive and unpredictable punitive damages are ultimately harmful to the economy, workers and consumers.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of law, including law and public policy. AEF has appeared as *amicus curiae* before the U.S. Supreme Court in numerous cases as co-amicus with WLF that are relevant to this case, including *State Farm Mut. Auto. Ins. Co.* v. *Campbell, BMW of N. Am. Inc.* v. *Gore,* and *Pacific Mut. Life Ins. Co.* v. *Haslip.*

WLF and AEF believe that they can bring a broader perspective on the issues presented in this case which will assist the Court in deciding this case in such a way as to give clearer guidance to courts on the imposition of punitive damages awards.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

Amici curiae are, in the interest of brevity, omitting any detailed statement of the facts of this case. *Amici* adopt by reference the statement of facts set forth in Petitioner's Brief.

In short, Jesse Williams was a lifelong smoker of Marlboro cigarettes, a brand of cigarettes manufactured by Philip Morris. Throughout his life, Williams was repeatedly warned—by his parents and wife, among others—of the dangers associated with smoking cigarettes. Still, he continued smoking for over 45 years and was diagnosed with lung cancer in 1996. Williams died one year later, and his widow ("plaintiff") sued Philip Morris. *Williams* v. *Philip Morris Inc.*, 127 P.3d 1165, 1168 (Or. 2006).

In her complaint, plaintiff alleged that Philip Morris was negligent because it (1) sold cigarettes that it knew or should have known were addictive and caused causer; (2) manipulated the contents of cigarettes in order to maintain and enhance their addictive effects; (3) failed to test cigarettes in ways likely to link smoking with human disease and; (4) failed to manufacture a safer cigarette. Plaintiff also alleged that Philip Morris engaged in fraud by denying that a link between smoking and cancer had been scientifically established. *Id.*

During closing arguments at trial, plaintiff's counsel repeatedly encouraged the jury to punish Phillip Morris not only for harm allegedly to Williams, but also to masses of other, unidentified people:

> In Oregon, how many people do we see outside, driving home, coming to work, over

> the lunch hour smoking cigarettes? For every hundred, cigarettes that they smoke are going to kill ten through lung cancer. * * *
>
> When you determine the amount of money to award in punitive damages against Philip Morris . . . [i]t's fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been. It's more than fair to think about how many more are out there in the future. * * *

Pet. Cert. at 2. Philip Morris thus sought the following instruction in an attempt to protect against an unconstitutional punitive damages award:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable conduct. Although you may consider the extent of the harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own and award punitive damages for those harms, as those other juries see fit.

Williams, 127 P.3d at 1175. The trial court rejected this proposed jury instruction and instead told the jury that it was free to award punitive damages up to $100 million, the amount of punitive damages that plaintiff requested in her complaint. The instruction omitted any mention of the source of, or rationale for, this immense figure. *Id.*

The jury found for the plaintiff on fraud and negligence and awarded punitive damages only for the fraud count of $79.5 million (over 95 times the compensatory damages verdict of $821,485).[2] The trial court later held that the punitive damages award was excessive under federal standards and reduced the punitive damages award to $32 million, still 39 times the compensatory damages verdict. *Id.* at 1171.

Philip Morris appealed to the Oregon Court of Appeals, which rejected Philip Morris' argument that the trial court should have given an instruction regarding harm to non-parties, and reinstated the jury's $79.5 million punitive damages award. Philip Morris sought review in this Court, arguing that the Court of Appeals decision was inconsistent with *State Farm Mut.l Auto. Ins. Co.* v. *Campbell*, 538 U.S. 48 (2003) in numerous respects, including that the United States Constitution required the trial court to instruct the jury that any punitive damages award must bear a reasonable relationship to the harm caused to Williams himself, as

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[2] Notably, the jury found that Jesse Williams was 50 percent contributorily negligent for the damages that he sustained, the same damages he sustained as a result of the fraud or misrepresentation count. 127 P.3d at 1171 ("As to the negligence claim, the jury found Williams 50% responsible for the damages."). While the amount of the compensatory damages awarded was not reduced by 50 percent, due to the finding of liability on the fraud count, as it otherwise would be under Oregon's comparative negligence law, O.R.S. § 31.600, *amici* submit that the finding by the jury that Williams was responsible for 50 percent of the damages he suffered nevertheless further demonstrates the excessiveness of the punitive damages award in this case.

opposed to non-parties, such as past, present, and future Oregon consumers. This Court remanded the case to the Oregon Court of Appeals so that it could reconsider whether the restoration of the $79.5 million punitive damages award was proper in light of *State Farm*. *Philip Morris U.S.A., Inc.* v. *Williams*, 540 U.S. 801 (2003).

On remand, the Oregon Court of Appeals rebuffed Philip Morris' claims of instructional error, holding that it was consistent with *State Farm* for the jury to punish Philip Morris for harm to non-parties. Accordingly, the Court of Appeals reinstated the jury's $79.5 million damages award, and Philip Morris appealed yet again to the Oregon Supreme Court. *Williams* v. *Philip Morris, Inc.*, 92 P.3d 236 (Or.App. 2004).

The Oregon Supreme Court affirmed, ruling that the $79.5 million punitive damages award comports with due process because, in its view, *State Farm* does not prohibit courts from punishing a defendant for similar wrongdoing to non-parties, although plaintiff presented no evidence that any other non-party, much less masses of Oregonians, relied on fraudulent statements by Philip Morris in deciding to continue smoking. *Williams*, 127 P.3d at 1175. Moreover, the Oregon Supreme Court ruled that Philip Morris' wrongdoing was "extraordinarily" reprehensible, *i.e.*, it fell within the definition of criminal conduct, and that the *State Farm* and *Gore* limitations on the ratio between punitive and compensatory damages thus did not apply. *Id.* at 1179.

SUMMARY OF ARGUMENT

This Court's jurisprudence regarding punitive damages has implicitly recognized that defendants have a constitutional right to procedural due process that is separate and independent from any substantive due process right they may possess. In order to protect Philip Morris' constitutional right to procedural due process, the trial court should have instructed the jury on the constitutional constraints on punitive damages this Court recognized in *BMW of N. America, Inc.* v. *Gore*, 517 U.S. 559 (1996) and *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003), including the Court's directive that punitive damages award must bear a reasonable relationship to the actual injuries a plaintiff suffered and that it must not punish a defendant for harm to non-parties. Instead, the trial court refused to give this instruction or anything comparable and instructed the jury that it was free to award any amount of punitive damages up to $100 million, the amount sought in plaintiff's complaint. Indeed, the jury was impermissibly allowed to base its award on speculative damages to non-parties, namely Oregonians who smoke regardless of their reason for doing so, effectively converting the case into a class action without the procedural safeguards required for such actions.

With no meaningful guidance, nearly unconstrained discretion, and few procedural safeguards to assure the similarity of harm afflicted upon non-parties, the jury found for the plaintiff on her fraud claim and awarded $79.5 million in punitive damages. The trial court recognized that this award was inconsistent with federal law and it reduced the punitive damages award to $32 million, still 39 times the compensatory damages. The Oregon Court of Appeals,

however, reinstated the $79 million punitive damages award. To protect the constitutional rights of Philip Morris and other defendants at risk of being punished by runaway juries, the Court should vacate the judgment, order a new trial, and direct the trial court to give the jury meaningful instructions on how to apply the limits to punitive damages set forth in *Gore* and *State Farm*.

ARGUMENT

I. DEFENDANT'S RIGHT TO PROCEDURAL DUE PROCESS WAS VIOLATED IN THIS CASE BECAUSE THE JURY WAS NOT PROPERLY INSTRUCTED ON WHAT IT MAY CONSIDER WHEN ASSESSING A PUNITIVE DAMAGES AWARD

A. Philip Morris Has An Independent Right To Procedural Due Process

In assessing punitive damages, defendants have a constitutional right to procedural due process that is separate from any substantive due process rights. Here, Philip Morris' procedural due process rights were violated when the trial court refused to instruct the jury about constitutionally impermissible considerations in determining the amount of punitive damages post-*State Farm*.

In *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), this Court upheld the constitutionality of jury instructions that provided the jury with little guidance due to the existence of a comprehensive post-verdict check on the jury's discretion. In *Haslip*, the Alabama trial court's instructions told the jury little more than that the purpose of punitive damages was to punish the defendant and to deter

the defendant and others from engaging in such conduct in the future. *Id.* at 19. The instructions thus left the jury with "significant discretion in its determination of punitive damages." *Id.* Nevertheless, this Court upheld the constitutionality of these instructions because of Alabama's procedures for post-verdict review of punitive damages awards. *Id.* at 20-24.

Since *Haslip*, however, this Court has subsequently determined that the constitutionality of a punitive damages award is not merely a question of the size of the award, as is considered in a substantive due process analysis, but is also a question of whether the jury factored illegitimate, unconstitutional considerations into its determination. Indeed, Justice Kennedy recognized this in *TXO Prod. Corp.* v. *Alliance Res. Corp.*, explaining that "[w]hen a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award." 509 U.S. 443, 467 (1993) (Kennedy, J., concurring in part and concurring in judgment).

More recently, a majority of this Court also implicitly recognized that a defendant has an independent constitutional right to have a jury instructed regarding limitations on its use of evidence admitted in the case. In *State Farm*, this Court mandated that "[a] jury *must* be instructed . . . that it may not use out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." 538 U.S. at 422 (emphasis added). Such an instruction would not be required by the Constitution if post-verdict review could always provide a sufficient constraint on a jury's discretion. Indeed, it has

long been established that, if a jury does in fact base its determination on improper considerations, post-verdict remittitur cannot cure such constitutional infirmity. *See Minneapolis, St. P. & S.S.M. Ry.* v. *Moquin*, 283 U.S. 520, 521 (1931) (holding, in a different context, that remittitur cannot cure a verdict that was the result of a jury's "passion and prejudice").

Although decided before *State Farm*, the Ninth Circuit reached a similar conclusion in *White* v. *Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002), holding that post-verdict review of the size of a damages award cannot cure a verdict that was based on improper considerations. In *White*, the appellate court ordered a new trial on punitive damages because the trial court refused to instruct the jury that it may not punish the defendant for its out-of-state actions. *Id.* at 1019-20. In its decision, the court noted that "[a] punitive damages award that encompasses a defendant's extraterritorial conduct may be unconstitutional even if the size of the award itself, as compared to compensatory damages, is not outside the bounds of due process." *Id.* at 1016.

Because the jury might have considered inappropriate factors in reaching its decision, the Ninth Circuit sent the case back to the jury with orders that the jury receive more specific instructions from the trial court on what it was allowed to consider in reaching a punitive damages award. *Id.* at 1020. Like this Court, the Ninth Circuit understood that the only way to fully ensure defendants' procedural due process rights is to protect them in the first instance by properly instructing a jury.

B. Philip Morris' Right To Procedural Due Process Was Violated Because The Trial Court Failed To Instruct The Jury Regarding The Factors That Could And Could Not Be Considered Under *State Farm*

Since *Haslip* was decided 15 years ago, the Court has recognized significant constitutional restraints on the award of punitive damages beyond just the amount. These limitations include restrictions on the types of evidence and arguments that can provide a predicate for punitive damages. *See, e.g., Gore*, 517 U.S. at 573-74 (juries should not be allowed to consider either a defendant's lawful out-of-state conduct or overall wealth in determining the amount of punitive damages to award a plaintiff); *State Farm*, 538 U.S. at 423 (juries are not allowed to punish a defendant for harm to non-parties because "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains").

Logic dictates that the failure to instruct the jury regarding these constitutional constraints, and in particular the *State Farm* rule that juries should not adjudicate and punish for the claims of non-parties, violated Philip Morris' right to procedural due process. Indeed, it would be wholly inconsistent for the Court to recognize such constitutional constraints, on the one hand, but not require juries to even be informed of the constraints, on the other. As such, this Court should find that procedural due process entitled Philip Morris to a jury instruction on the *State Farm* rule that punitive damages must be reasonably related to plaintiff's

actual compensatory damages and not harm afflicted on non-parties.

In fact, this Court has previously mandated that a jury be given instructions regarding the proper use of evidence in determining punitive damages. This Court ruled in *State Farm* that a jury must be instructed that it "may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Id.* at 422. Post-*State Farm*, there is simply no rational reason for this Court to require lower courts to instruct juries on one limit on their power to punish (*i.e.*, that they may not punish for harms incurred outside the forum state), but not require instructions regarding a logically indistinguishable limit (*i.e.*, that they may not punish for harm to non-parties and instead must apportion the punitive award relative to the size of plaintiff's compensatory damages); it would be wholly inconsistent to hold otherwise.

Moreover, permitting the jury to punish Philip Morris for supposedly similar harm to non-parties is analogous to allowing classwide punishment with none of the procedural safeguards provided for such actions. *See* Fed. R. Civ. P. 23. In the class action context, this Court has recognized the importance of requiring the class representative to prove the typicality of their claim and the predominance of common questions of law and fact. *See, e.g., Amchem Prod. Inc.* v. *Windsor*, 521 U.S. 591, 623-25 (1997). These safeguards are in place in part to ensure that the efficiency of the class action procedure does not come at the expense of providing a defendant a fair opportunity to defend itself against claims of liability.

The Oregon Supreme Court's holding that juries may consider harm to non-parties implicates the same due process concerns at issue in the class action context. A rule allowing juries to punish a defendant for harm and future harm to non-parties, as suggested by the Oregon Supreme Court, would essentially allow a plaintiff to obtain class relief without having to make any evidentiary showing that common questions of law and fact predominate, or why individual defenses peculiar to certain non-parties do not predominate. Here, the jury may have impermissibly punished Philip Morris for harm to non-parties without plaintiff having to prove that any of the non-parties heard and relied on false statements by Philip Morris in deciding to smoke. What makes this process even more unfair to Philip Morris is that the jury's determination would have no *res judicata* effect on non-parties, who would remain free to bring claims against Philip Morris in the future, and to seek even punitive damages for the same conduct.

C. There Is No Legitimate, Constitutional Basis For Not Instructing The Jury Regarding The *State Farm* Restriction That Punitive Damages Should Not Be Based On Harm To Non-Parties

While this Court has held that a jury can consider the scope of the harm created by the defendant's overall conduct (including harm to non-parties) in evaluating the reprehensibility of the specific acts that harmed the plaintiff in a particular case, *see, e.g.*, *Gore*, 517 U.S. 559, 574 n.21 (1996), the Court has also held that a jury may not punish a defendant for harm it allegedly caused a non-party. *See, e.g.*, *State Farm*, 538 U.S. at 423 ("[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate

the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . ."). A contrary rule would risk cumulative punishments for the same conduct and run afoul of the Constitution. *Id.* (cautioning that punishing a defendant for harm caused to a nonparty "creates the possibility of multiple punitive damages awards for the same conduct, for nonparties are not normally bound by another plaintiff's judgment").

Without an instruction that any punitive damages award must bear a reasonable relationship to this particular plaintiff's compensatory damages (*e.g.*, this plaintiff suffered because of Philip Morris' alleged actions against her), the jury in this case may not have appreciated the subtle, yet significant, distinction between considering harm to non-parties to gauge the reprehensibility of Philip Morris' conduct toward plaintiff, and punishing Philip Morris for alleged wrongdoing afflicted on nonparties. In such situations, where there is a danger that evidence admissible for one purpose may be considered by the jury for an illegitimate, unconstitutional purpose, courts have required limiting instructions to be given to juries. *See, e.g.*, Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 676 (2003) ("it is a familiar principle that, when evidence is admitted for one purpose, but would violate the Constitution for the jury to consider it for a different purpose, the court should instruct the jury not to consider the evidence for the impermissible purpose").

Indeed, this Court has often required limiting instructions where it would violate the Constitution if evidence considered for an admissible purpose was considered for an improper purpose. *See, e.g., Tennessee* v.

Street, 471 U.S. 409, 414-15 (1985) (holding that the Confrontation Clause is not violated by the introduction of the confession of an accomplice for the nonhearsay purpose of rebutting the defendant's testimony that his own confession was coercively derived from the accomplice's statement, but only if the jury is instructed not to consider the confession for the truth of the matter asserted); *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983) ("Introduction of the defendant's prior conviction did not pose a sufficient danger of unfairness to the defendant . . . in part because such evidence was accompanied by instructions limiting the jury's use of the conviction to sentence enhancement"); *Harris* v. *New York*, 401 U.S. 222, 224 (1971) (holding that the state may introduce statements elicited from a defendant in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), for the purpose of impeachment, so long as the jury is instructed that such evidence may not be considered for the purpose of determining guilt).

Although *Tennessee*, *Marshall*, and *Harris* all involved criminal defendants, the need for a limiting instruction in the civil punitive damages context is no less compelling. *See State Farm*, 538 U.S. at 417 (noting that although punitive damages in civil cases are intended to serve the same purpose as criminal penalties, "defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding"). Philip Morris' proposed instruction that any punitive damages award must bear a reasonable relationship to plaintiff's compensatory damages in this case and not punish Philip Morris for harm to non-parties is analogous to the limiting instructions that this Court has required in other contexts. Accordingly, it should have been given to the jury, particularly in light of plaintiff's counsel's urging of the jury

to consider speculative damages to thousands of other current and future smokers in the State of Oregon, regardless of their reason for smoking.

D. The Trial Court Violated Philip Morris' Right To Procedural Due Process In Instructing The Jury That It Was Free To Award Damages Up To $100 Million

Although the Court in both *Gore* and *State Farm* declined to recognize any "rigid benchmark" that a punitive damages award may not surpass, *Gore*, 517 U.S. at 581 and *State Farm*, 538 U.S. at 425, in *State Farm* the Court unambiguously admonished that, in practice, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 424-25. Here, the court instructed the jury that it was free to award punitive damages up to $100 million without even knowing the amount of compensatory damages the jury would award. Logically, it was inconsistent with procedural due process for the trial court to have instructed the jury that it could impose a particular punitive damages award without any knowledge of what the compensatory damages award would be.

Furthermore, Philip Morris was prejudiced by the suggestion of a $100 million dollar limit on punitive damage because this gave the jury a reference point which likely significantly influenced the punitive damages award. Numerous scientific studies regarding dollar suggestions for damages have confirmed what cognitive researchers have labeled an "anchoring effect." These studies have established a linear relationship between the dollar

suggestions and subsequent awards. Put simply, a larger request yields a greater award. *See* Don Rushing, et al., *Anchors Away: Attacking Dollar Suggestions for Non-Economic Damages in Closings*, (Defense Counsel Journal, July 2003); John Malouff & Nicola A. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. Soc. Psychol. 491 (1989); Gretchen B. Chapman & Brian Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519 (1996). One study even found that nearly half of mock jurors selected a damages award that *exactly* matched the amount requested, demonstrating the power of the anchoring effect. A. Raitz & E. Greene, *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 Law and Human Behavior 385 (1990).

Making matters worse, the trial court further compromised Philip Morris' right to procedural due process by not informing the jury about the source of the $100 million figure: plaintiff's own complaint. Had the jury been so informed, it may have at least inferred that the number was just a self-serving demand and given less weight to the figure. Thus, not only did the trial court instruct the jury that it could award a punitive damages award that may well be in excess of constitutional limits, given the amount of compensatory damages awarded in this case, but it compounded its errors by failing to inform the jury of the source of the figure. Thus, the figure may have seemed to carry the imprimatur of the trial court, compounding the anchoring effect in this case.

CONCLUSION

For the foregoing reasons, and those presented by the Petitioner, the judgment below should be reversed.

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Arvin Maskin*
Konrad L. Cailteux
David R. Singh
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, N.Y. 10153
(212) 310-8000

*Counsel of Record

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